No. 97-7164-CFY Title: Francois Holloway, aka Abdu Ali, Petitioner
v.
United States

Docketed: December 18, 1997 Court: United States Court of Appeals for the Second Circuit

Entry	Date	Proceedings and Orders
	Dec 12 1997	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due March 16, 1998)
	Dec 23 1997	Waiver of right of respondent United States to respond filed.
	Dec 31 1997	DISTRIBUTED. January 16, 1998
	Jan 13 1998	Response requested.
	Feb 3 1998	Order extending time to file response to petition until March 16, 1998.
	Mar 16 1998	Brief of respondent United States in opposition filed.
	Mar 26 1998	REDISTRIBUTED. April 17, 1998
	Apr 20 1998	REDISTRIBUTED. April 24, 1998
	Apr 27 1998	Petition GRANTED. SET FOR ARGUMENT November 9, 1998. **********
	May 26 1998	Order extending time to file brief of petitioner on the merits until July 2, 1998.
	Jun 2 1998	Joint appendix filed.
	Jun 26 1998	Motion of petitioner for appointment of counsel filed.
	Jul 2 1998	Brief of petitioner Francois Holloway filed.
	Jul 2 1998	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
	Jul 8 1998	DISTRIBUTED. September 28, 1998 (Page 38)
	Jul 31 1998	Record filed.
	Aug 3 1998	Record filed.
	Aug 10 1998	Brief of respondent United States filed.
	Sep 14 1998	Reply brief of petitioner Francois Holloway filed.
	Sep 17 1998	CIRCULATED.
	Oct 5 1998	Motion for appointment of counsel GRANTED and it is ordered that Kevin J. Keating, Esquire, of Garden City, New York, is appointed to serve as counsel for the petitioner in this case.
	Nov 9 1998	ARGUED.

IPP

97-7164

No. _____

In The Supreme Court of the United States

October Term, 1997

FRANCOIS HOLLOWAY, also known as ABDU ALI,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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(9)

Supreme Court of the United States

No. 97-7164

Francois Holloway, aka Abdu Ali,

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Second Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

April 27, 1998

97-7164

No. _____

**In The
Supreme Court of the
United States**

October Term, 1997

FRANCOIS HOLLOWAY, also known as ABDU ALI,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, Francois Holloway a/k/a Abdu Ali, asks leave to file the attached petition for a writ of certiorari, without prepayment of costs and to proceed in forma pauperis. Petitioner has been granted leave to so proceed in both the United States District Court and the United States Court of Appeals. No affidavit is attached, inasmuch as the United States District Court appointed counsel for petitioner under the Criminal Justice Act of 1964.

David Secular

DAVID SECULAR, Of Counsel

(9)

97-7164
Holloway

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QUESTION PRESENTED

1. DOES THE COURT OF APPEALS HOLDING THAT CONDITIONAL INTENT IS INCLUDED WITHIN THE LEGAL DEFINITION OF SPECIFIC INTENT IN THE AMENDED CARJACKING STATUTE VIOLATE BOTH FUNDAMENTAL PRINCIPLES OF STATUTORY CONSTRUCTION AND PETITIONER'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW?

LIST OF PARTIES

The parties to the proceedings below were the United States of America and Francois Holloway a/k/a Abdu Ali. The parties before this Court on the instant petition are Francois Holloway a/k/a Abdu Ali and the United States of America.

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No. _____

In The Supreme Court of the United States

October Term, 1997

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-against-

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Francois Holloway a/k/a Abdu Masi Ali respectfully prays that a writ of certiorari issue to review a decision of the United States Court of Appeals for the Second Circuit which upheld Petitioner's conviction and appeal from a judgment of the United States District Court, Eastern District of New York, (Gleeson, J.), entered on August 16, 1996. Petitioner was convicted following a jury trial of conspiracy to operate (18 U.S.C. §371) and the operation of a chop shop (18 U.S.C. §2322); three separate counts of carjacking; and three separate counts of the use of a firearm during a crime of violence (18 U.S.C. §924 (c) [1]).

OPINIONS BELOW

The District Court's opinion and decision to instruct the jury on the concept of conditional intent is reproduced in Appendix "A" and is reported at 921 F.Supp. 155, 160 (E.D.N.Y. 1996). The opinion of the Court of Appeals for the Second Circuit issued on September 16, 1997 upholding the District Court's determination and validating the concept of conditional intent is reproduced at Appendix "A" and is reported at 126 F.3d 82.

JURISDICTION

The judgment of the Court of Appeals was entered on September 16, 1997. No application has been made for an extension of time within which to file this petition. Petitioner seeks review of a decision rendered by a federal Court of Appeals. Thus, jurisdiction for this petition exists under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public

danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

STATUTES INVOLVED

18 U.S.C. §2119 (prior to the 1994 Amendments):

Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall --

1. be fined under this title or imprisoned not more than 15 years, or both

2. if serious bodily injury (as defined in section 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and

3. if death results, be fined under this title or imprisoned for any number of years up to life, or both.

The Violent Crime Control and Law Enforcement Act of 1994 amendment to the statute:

> (14) CARJACKING. --Section 2119(3) of title 18, United States Code, is amended by striking the period after "both" and inserting, "or sentenced to death."; and by striking ", possession of a firearm as defined in section 921 of this title," and inserting, "with the intent to cause death or serious bodily harm".

Pub. L. 103-322, §60003(a)(14). With these revisions, the statute

now reads:

18 U.S.C. §2119 (1997)

Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from a person or presence of another by force and violence or by intimidation, or attempts to do so, shall --

1. be fined under this title or imprisoned not more than 15 years, or both

2. if serious bodily injury (as defined in section 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and

3. if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death.

STATEMENT OF THE CASE

The heart of the instant petition is the trial court's instruction to the jury on the concept of conditional intent.

At trial, the government's witnesses described petitioner's involvement in a number of charged carjackings. The evidence concerning all of the charged offenses, however, never revealed any specific intention on the part of petitioner to specifically cause serious injury to any of the victims of the crimes. The evidence as to each carjacking offense instead at most proved the intention to cause serious physical injury only in the event the victim refused to relinquish or resisted the taking of their vehicle.

Thus, although there were threats communicated in the course of a number of the offenses, the cooperating codefendant, Vernon Lennon, testified that the charged carjackings were all part of a plan to steal the victims' cars without harming the victims and that a gun would only be employed if one of the victims had given the perpetrators "a hard time" or had resisted.

At the conclusion of the evidence, Judge Gleeson charged the jury, over the objection of defense counsel on the doctrine of conditional intent and deemed it sufficient to satisfy the mental culpability required for the commission of the crime. Judge Gleeson instructed the jury that an intent to cause death or serious bodily harm conditioned on whether the victims refused to surrender their cars was sufficient to satisfy the specific intent requirement of the statute.

During their deliberations the jury requested that the court

recharge them on the legal definition of intent and in response the court again included the concept of conditional intent in its instructions to the panel. (The Court's charge and recharge on conditional intent is reproduced in the appendix).

On the basis of the trial court's conditional intent instructions, petitioner was found guilty of all eight counts of his indictment.

Following the verdict, petitioner moved for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, or in the alternative, for reconsideration of his unsuccessful Rule 29 motion. Petitioner argued that the court erred in charging the jury on conditional intent in view of the carjacking statute's unambiguous specific intent requirement, which requires a carjacker to have the intent to cause death or serious bodily harm as an express element of the crime. 18 U.S.C. §2119.

In a decision, issued on April 5, 1996, Judge Gleeson, denied petitioner's post-trial motion. On August 16, 1996, petitioner was sentenced and on August 28, 1996, judgment of conviction was entered.

On September 16, 1997, the Second Circuit Court of Appeals upheld petitioner's conviction and in a majority opinion held that the court's instruction on conditional intent was correct.

In a majority opinion written by District Judge Frederick J. Scullin of the Northern District of New York who was sitting by designation as a Judge of the Second Circuit, the court found that the concept of conditional intent to harm is included within the

definition of specific intent. Notwithstanding the absence of any precedent in federal law, Judge Scullin relied on state law and the Model Penal Code (which of course has never been adopted by the federal courts) as support for finding conditional intent to be included within the concept of specific intent.

Finally, although the majority opinion stated that it was not attempting to rewrite a poorly drafted statute, the court wrote, "Furthermore, and most importantly, incorporating conditional intent within the specific intent language of the statute comports with the reasonable interpretation of the legislative purpose of the statute." (The majority and dissenting opinion is reproduced in the appendix).

In a carefully worded dissenting opinion, Judge Miner disagreed with the majority because he found no basis in the plain language of the statute or in its legislative history to support expanding the mental culpability required for the commission of the crime of carjacking to include conditional intent. Judge Miner instead reasoned that the language of the statute was clear and unambiguous, nor was there sufficiently persuasive information in the Congressional record to support a conclusion that the heightened intent requirement added by the 1994 amendments to the crime was an "unintended drafting error."

Moreover, Judge Miner wrote that even if the heightened intent requirement was an inadvertent legislative mistake, the Supreme Court has long held that "to supply omissions (to a statute) transcends the judicial function."

Finally, Judge Miner stressed that there is no basis in federal law which permits the expansion of specific intent to include the concept of conditional intent. The two are clearly different states of mind. Thus, despite assertions to the contrary, in finding that the carjacking statute encompassed the conditional intent to cause serious injury or death, the majority effectively redrafted the law.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI BECAUSE: (A) THERE IS A SPLIT BETWEEN THE FEDERAL CIRCUITS REGARDING THE INTERPRETATION AND APPLICATION OF THE CARJACKING STATUTE, (B) THE FEDERAL COURTS REQUIRE A FINAL RESOLUTION CONCERNING THE CORRECT STATUTORY CONSTRUCTION OF THE CARJACKING STATUTE, (C) THE EXPANSION OF THE EXPRESS ELEMENTS OF THE MENTAL CULPABILITY COVERED BY THE CARJACKING STATUTE TO INCLUDE CONDITIONAL INTENT VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW.

The instant petition presents three compelling bases for the granting of a writ of certiorari. First, there exists a direct and inevitably growing conflict between the federal circuits concerning the correct interpretation of the federal carjacking statute. Second, Supreme Court review is required to resolve the important federal question as to the correct statutory construction of the amended federal carjacking law. Finally, the constitutional validity of the concept of conditional intent which heretofore has never existed as a principle of criminal liability in federal law needs to be resolved.

The Conflicts in the Circuit

In the instant case, the majority opinion held that the "specific intent to kill," reflected in 18 U.S.C. §2119 encompasses a conditional intent. The court ruled that the district court instruction to the jury that the petitioner could be convicted on a jury finding that he intended to cause death or serious physical injury to the victims of his crime in the event they resisted the taking of their vehicles was sufficient for conviction. In other words, the concept of conditional intent was presented to the jury

as an element of the crime and the Second Circuit Court of Appeals sustained such an instruction.

In sustaining the district court's injection of the concept of conditional intent, the Second Circuit Court of Appeals reasoned that conditional intent is a more culpable state of mind than a reckless one because it encompasses premeditation in the sense that the individual has considered the possibility that his victim may resist and if such a situation develops the defendant is prepared to seriously harm or kill them. A reckless state of mind constitutes an awareness of injury or death from the forcible taking of a vehicle which is disregarded by the perpetrator. The majority Second Circuit opinion reasons that such a state of mind constitutes a lesser culpable state than the thinking involved in a conditional intention.

The Second Circuit opinion in the instant case, however, recognizes that a conditional intent is still nevertheless different than specific intent and is inarguably not a specific intent or purposeful objective of the criminal act. Nevertheless, in finding that conditional intent is more than a reckless state of mind, the Second Circuit held that conditional intent is somehow included in the concept of specific intent.

The reasoning of the Second Circuit is flawed and inconsistent with the holding of the ninth circuit in United States v. Randolph, 93 F.3d 656, 660, 661 (9th Cir. 1997). The express language of 18 U.S.C. §2119 provides that the specific intent to cause death or bodily harm to the victim is an element of the crime of carjacking.

Thus, the Court in Randolph correctly recognized that to hold that conditional intent is somehow included in the statute is to ignore both the clear language and the unequivocal meaning of the statute.

The Ninth Circuit in United States v. Randolph, supra., found that Congress definitively provided that the specific intent to seriously harm or kill was an essential element of the crime and that consequently the legislature chose not to define the offense in the manner sustained by the Second Circuit. The lowering of the standard of criminal culpability allowed in the instant case by the Second Circuit was addressed and rejected by the Ninth Circuit.

The split in the Circuits does not, however, end here. The third circuit in United States v. Anderson, 108 F.3d 478, 482-483 (3d Cir. 1997), cert. denied 118 S.Ct. 123 (Oct. 6, 1997), and the tenth circuit in United States v. Romero, 122 F.3d 1334 (10th Cir. 1997), have also accepted the heretofore unprecedented federal criminal law concept of conditional intent and applied the carjacking statute in such a manner. Although the Supreme Court has recently denied a petition for certiorari in the Anderson case, it is respectfully submitted that the issue will continue to split the Circuits in future cases and can only be resolved by the intervention of the Supreme Court. Indeed, both prior and subsequent to the decision in Anderson, the issue has created division in the holdings of several district courts. United States v. Lake, 972 F.Supp. 328 (Dist. of the Virgin Islands, 1997) (upheld the concept of conditional intent); United States v. Craft, 1996 U.S. Dist. LEXIS 18964, 1996 WL 745527 (E.D. Pa. Dec. 23,

1996) (rejected the concept of conditional intent); United States v. Norwood, 948 F.Supp. 374, 377 (D.N.J. 1996) (upheld the concept of conditional intent).

The Substantial Question of Federal Statutory Construction

The correct construction and interpretation of the carjacking statute lies at the heart of the split between the circuits. The ninth Circuit in United States v. Randolph, supra., adhered to the express language and plain meaning of the amended car jacking statute and refused to extend its reach to crimes where the specific intent to cause serious bodily harm did not exist.

Notwithstanding the express language of the statute, however, as previously noted, the Second Circuit in the instant case has chosen to interpret the offense as containing conditional intent as an element of the crime.

As Judge Miner noted in his dissenting opinion, notwithstanding the statement in the majority opinion that the Court of Appeals (of the Second Circuit) "declines any invitation to redraft the statute," by finding a conditional intent implicit in the law, the court has unquestionably engaged in the prohibited exercise of judicial legislation.

The intent required for the commission of the crime is explicitly spelled out in the statute. Under such circumstances, where the plain meaning of a law is clear and unequivocal, the courts are precluded from adding to or reducing the scope of the law. Rubin v. United States, 449 U.S. 424, 430, 66 L.Ed2d 633, 101 S. Ct. 698 (1981); Consumer Prod. Safety Comm'n v. GTE Sylvania,

447 U.S. 102, 64 L.Ed.2d 766, 100 S.Ct. 2051 (1980); Checkrite Petroleum, Inc. v. Amoco Oil Co., 678 F.2d 5, 8 (2d Cir. 1982), cert. denied 459 U.S. 833, 74 L.Ed.2d 73, 103 S.Ct. 74 (1982).

Nevertheless, the Second Circuit in the instant case, the Third Circuit in United States v. Anderson, supra., and Tenth Circuit in United States v. Romero, supra., have all ignored the first fundamental principle of statutory construction and stretched the law to encompass crimes where no specific intent to seriously injure exists and the most which can be found is the willingness to harm a victim if the taking of a vehicle is resisted.

The Second Circuit opinion in the instant case is also indefensible because even if the legislative process behind the amendment of the carjacking statute is analyzed there is a complete absence of determinative information in the Congressional record which reveals the motivation for discerning why the heightened element of the specific intent to cause serious harm or death was added to the statute. Indeed, since the possession of the weapon element of the offense was deleted by the 1994 amendments to the statute, a persuasive argument can be made that the specific intent requirement was added to the carjacking statute in order to provide some meaningful limit to the scope of what previously was only a state court crime.

The majority opinion in the instant case, however, has implicitly adopted a counter argument that Congress committed an unintended drafting error in amending the carjacking statute to contain a heightened specific intent to seriously harm or cause

death and that the only Congressional objective was to add a death penalty provision to the law and to eliminate the firearm requirement of the statute.

The Courts, however, have no authority to correct a perceived unintentional drafting error to make the law consistent with judicial speculation as to the truly desired but never legislatively expressed objectives of the law. Once again as Judge Miner recognized in his dissenting opinion, by adding a conditional intent element to the crime of carjacking the Second Circuit has ignored the teaching of the Supreme Court that "to supply omissions transcends the judicial function." See the dissenting opinion of Judge Miner; Iselin v. United States, 270 U.S. 245, 251, (1926), quoted in West Virginia Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 101 (1991).

In rendering differing interpretations of the intent element of the carjacking statute, the federal courts are inconsistently interpreting and applying an important federal criminal statute. Moreover, in failing to adhere to the plain unequivocal language of the statute, several federal circuits have exceeded their authority and effectively usurped the legislative function.

It is respectfully submitted that a review by the Supreme Court is essential to reaffirm longstanding principles of statutory construction and to ensure that in the future the carjacking statute will be fairly and uniformly applied throughout the country.

The Due Process Question

In upholding the petitioner's conviction in the instant case, the Second Circuit has created a standard of criminal culpability which has never previously been recognized in federal law. The concept of conditional intent has no precedent in federal case law nor does it comport with recognized standards of criminal liability.

By holding that the concept of conditional intent to harm is encompassed within the definition of a specific intent to harm, the Second Circuit has indefensibly expanded the principles of criminal liability which exist in the federal courts. Indeed, there is no federal criminal statute which provides for conditional intent as an element of the crime nor is there a provision in the Federal Criminal Code which provides that the requirement of intent is satisfied by proof of conditional intent. Finally, as again noted in the carefully reasoned dissenting opinion of Judge Miner, there is no federal common law of crimes (see United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34, 3 L.Ed. 259 (1812)), state criminal law supplies no basis upon which to interpret a federal statute and the Model Penal Code has never been adopted by Congress.

In view of the foregoing facts, a legitimate precedential basis upon which to justify expanding the concept of specific intent to encompass a theory of conditional intent simply does not exist. The creation and implementation of such a novel theory of criminal liability in the instant case consequently clearly

violates fundamental principles of due process.

In short, the United States Constitution does not allow new concepts of criminal culpability to be created after the fact in order to punish conduct which would otherwise be beyond the reach of the federal system. Thus, it is respectfully submitted that Supreme Court review is essential in the instant case to prevent the present and future unconstitutional application of the carjacking statute and possibly to conduct additional federal crimes which is simply not the product of a statutorily proscribed state of mind.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
December 10, 1997

Respectfully Submitted,

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Of Counsel

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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59 pp

QUESTION PRESENTED

Whether a jury may find that a defendant acted "with the intent to cause death or serious bodily harm" for purposes of the federal carjacking statute, 18 U.S.C. 2119, if it finds that the defendant intended to cause death or serious harm if the victim refused to comply with his demands.

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OCTOBER TERM, 1997

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 126 F.3d 82. The opinion of the district court (Pet. App. 25a-32a) is reported at 921 F. Supp. 155.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1997. The petition for a writ of certiorari was filed on December 12, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of

conspiracy to operate a "chop shop" in violation of 18 U.S.C. 371; operating a chop shop, in violation of 18 U.S.C. 2322; three counts of carjacking, in violation of 18 U.S.C. 2119; and three counts of using a firearm during and in relation to a crime of violence, in violation of 118 U.S.C. 924(c). He was sentenced to concurrent prison terms of 60 months for conspiracy, 151 months for operation of the chop shop, and 151 months for each count of carjacking; a consecutive term of five years' imprisonment on the first firearms count; and two additional consecutive 20-year terms on the two remaining firearms counts. The district court also imposed a five-year term of supervised release. The court of appeals affirmed. Pet. App. 1a-23a.

1. In September 1994, Teddy Arnold recruited his son, Vernon Lennon, to steal cars to be taken to a Queens, New York "chop shop" for dismantling. Lennon, in turn, recruited petitioner and David Valentine to assist him. The three agreed that they should use a firearm during their thefts, and Lennon showed the others a .32-caliber revolver for that purpose. Pet. App. 3a.

On October 14, 1994, petitioner and Lennon followed a 1992 Nissan Maxima driven by 69-year-old Stanley Metzger. When Metzger stopped and parked across from his residence, Lennon approached, pointed his gun at Metzger, and demanded Metzger's car keys. Metzger first gave Lennon his house keys, but Lennon demanded the car keys, telling Metzger "I have a gun. I am going to shoot." Metzger then surrendered his keys and his money, and Lennon drove away in the Maxima. Pet. App. 3a-4a.

The following day, Lennon and petitioner followed a 1991 Toyota Celica driven by Donna DiFranco. When DiFranco parked, Lennon approached her, pointed his gun at her, and demanded her money and car keys. After DiFranco disengaged the car alarm and unlocked the "club" device that secured the steering wheel, Lennon drove off in her car. Pet. App. 4a.

That same day, Lennon and petitioner followed a 1988 Mercedes-Benz driven by Ruben Rodriguez until Rodriguez parked near his home. As Lennon and petitioner approached him, Rodriguez retreated to his car. Lennon produced his gun and threatened: "Get out of the car or I'll shoot." Rodriguez complied, and Lennon demanded his money and car keys. When Rodriguez hesitated, petitioner punched him in the face. Rodriguez surrendered the items and fled on foot. Lennon drove off in the Mercedes, and petitioner followed in another car. Pet. App. 4a.

Lennon pleaded guilty to several carjacking and robbery charges and testified as a government witness at trial. Lennon testified that his plan was to steal cars without harming the victims, but that he would have used the gun if any of the victims had resisted or given him "a hard time." Pet. App. 5a.

Petitioner was charged with a variety of offenses. See pages 1-2, supra. With respect to carjacking, the district court instructed the jury that in order to find petitioner guilty it must find that his "intent in committing the crime [was] to cause death or serious bodily harm." Tr. 336. Over the objection of defense counsel, the court also instructed the jury that, under a theory of

"conditional" intent, it could find petitioner guilty if it found that he "intended to cause death or serious bodily harm if the alleged victims had refused to turn over their cars." Pet. App. 6a, 11a; Tr. 336-337.[1] The jury convicted petitioner on all counts.

2. The court of appeals affirmed. Pet. App. 1a-18a. With respect to the district court's "conditional intent" instruction,

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[1] The court gave the following instructions (Tr. 336-337):

> The defendant's intent in committing the crime must have been to cause death or serious bodily harm. I remind you that intentional conduct is done willfully, with a bad purpose to do something the law forbids, in this case, to cause death or serious bodily harm to the person from whom the car was taken.
>
> It is the defendant's theory of the case that the evidence fails to prove that he acted with intent to cause death or serious bodily harm.
>
> Evidence that the defendant intended to use a gun to frighten the victims is not sufficient in and of itself to prove an intent to kill or cause serious bodily harm. It is, however, one of the facts you may consider in determining whether the government has met its burden.
>
> You may also consider the fact that no victim was actually killed or seriously injured when you consider the evidence or lack of evidence as to the defendant's intent.
>
> In some cases, intent is conditional. That is, a defendant may intend to engage in certain conduct only if a certain event occurs.
>
> In this case, the government contends that the defendant intended to cause death or serious body harm if the alleged victims had refused to turn over their cars. If you find beyond a reasonable doubt that the defendant had such an intent, the government has satisfied this element of the offense.
>
> If you find that the co-defendant, Vernon Lennon, acted with the intent to cause death or serious bodily injury, that is not sufficient. You must find that the defendant shared in that intent before you can conclude that this element has been satisfied.

the court first reviewed the history of 18 U.S.C. 2119. Id. at 8a-11a. It noted that before 1994, Section 2119 required proof that a defendant possessed a firearm in connection with a carjacking, but imposed no explicit intent requirement. In 1994, Congress amended the statute to authorize imposition of the death penalty if a carjacking resulted in death, and to delete the phrase "possessing a firearm." The court remarked that the present language requiring "intent to cause death or serious bodily harm" was inserted late in the legislative process, without recorded explanation. Id. at 9a. The court nonetheless thought it "clear from • • • the legislative history that Congress intended to broaden the coverage of the federal carjacking statute," and it speculated that application of the new intent requirement to cases not involving the death of a victim "was, in all likelihood, an unintended drafting error." Pet. App. 9a-10a. The court "decline[d]," however, "any invitation to redraft the statute," and instead considered whether the new intent element could be satisfied by proof of "conditional" intent to kill or harm a victim only if it proved necessary to do so in order to effectuate the carjacking. Id. at 10a.

The court rejected (Pet. App. 12a) petitioner's argument that "conditional" intent involved "no more than a state of mind where death is a foreseeable event." In the court's view, "conditional intent requires a much more culpable mental state," because "[a] carjacker who plans to kill or use deadly force on a victim in the event that his victim fails to comply with his demands has engaged

in willful and deliberate consideration of his actions." Ibid. Under those circumstances, the court explained, "death is more than merely foreseeable, it is fully contemplated and planned for." Ibid.

The court observed that "the inclusion of a conditional intent to harm within the definition of specific intent to harm is a well-established principle of criminal common law" (Pet. App. 13a), supported by state statutory and case law, academic commentary, and the Model Penal Code (see id. at 13a-15a). "Furthermore, and most importantly," the court concluded that "incorporating conditional intent within the specific intent language of the carjacking statute comports with a reasonable interpretation of the legislative purpose of the statute." Id. at 15a. Rejecting an interpretation that "would have the federal carjacking statute covering only those carjackings in which the carjacker's sole and unconditional purpose at the time he committed the carjacking was to kill or maim the victim," the court held instead that "an intent to kill or cause serious bodily harm conditioned on whether the victim relinquishes his or her car is sufficient to fulfill the intent requirement set forth in the federal carjacking statute." Id. at 15a-16a.[2]

Judge Miner dissented. Pet. App. 18a-23a. In his view, there was "no basis in the plain language of [Section 2119] or in the

[2] The court also rejected petitioner's further claims that he had received ineffective assistance of counsel and that the trial court had erred in imposing consecutive sentences with respect to his firearms offenses. Pet. App. 16a-17a. Petitioner does not renew those claims in this Court.

legislative history for an element of conditional intent." Id. at 18a. Rather, Judge Miner concluded that "[t]he intent required is spelled out explicitly in the statute," and that any common-law interpretation of that requirement lay beyond the power of courts applying federal criminal law. Id. at 23a. He would therefore have reversed petitioner's convictions and remanded for retrial. Ibid.

ARGUMENT

Petitioner contends (Pet. 9-16) that in order to prove carjacking in violation of 18 U.S.C. 2119 the government must show that the defendant acted with the "purposeful objective" (Pet. 10) of causing death or serious bodily harm while taking the victim's car, whether or not the victim offered any resistance. This Court has recently denied review in two cases involving the same issue, and there is no reason for a different result here. See Anderson v. United States, 118 S. Ct. 123 (1997); Fraction v. United States, 118 S. Ct. 100 (1997); see also Romero v. United States, petition for cert. pending, No. 97-6863 (filed Nov. 18, 1997).

1. Section 2119 provides for the punishment of any person who "with the intent to cause death or serious bodily harm takes a motor vehicle * * * from the person or presence of another by force and violence or by intimidation." As the court of appeals pointed out (Pet. App. 7a-9a), Congress added the "intent" language in 1994 in place of the phrase "possessing a firearm as defined in Section 921 of this title." See also United States v. Anderson, 108 F.3d 478, 481-482, cert. denied, 118 S. Ct. 123 (1997). That change,

which accompanied the addition of authorization to impose the death penalty in cases in which death results, was evidently intended to broaden the statute to cover situations where the carjacker uses a knife or other weapon rather than a firearm. See id. at 481-483; Pet. App. 9a-10a. It would be ironic if the amendment were instead interpreted to narrow the coverage of Section 2119 by excluding cases in which a carjacker would prefer to proceed by intimidation, but intends to use actual force and violence if necessary -- cases that obviously fall within the core purpose of the statute.

The text does not require that result. The "intent" language added in 1994 need not be read to require any more than that the defendant intentionally undertook actions which posed a serious and unjustifiable risk of death or serious bodily harm to the victim. The conduct involved in most carjackings would, of course, easily satisfy that requirement. It would be the rare crime that met Section 2119's other criteria, but escaped punishment under that provision because of the extraordinary care taken by the defendant to ensure that his victims would sustain no physical harm.

This case, however, did not require the court of appeals to go that far in interpreting Section 2119's "intent" requirement. See Pet. App. 12a (distinguishing "conditional intent" from criminal recklessness or "depraved indifference"). Nothing in the facts of this case suggests a situation in which the defendant intended not to use force under any circumstances, but nonetheless took actions that presented a serious risk that injury or death would result. The court here held only that Section 2119 covers the conduct of a

defendant if the jury finds that he was prepared to use deadly force, but was spared the necessity of doing so by the victim's acquiescence in his demands. Pet. App. 15a-16a; see also United States v. Williams, 1998 WL 50,191 (8th Cir. Feb. 10, 1998); United States v. Romero, 122 F.3d 1334, 1339 (10th Cir. 1997), petition for cert. pending, No. 97-6863 (filed Nov. 18, 1997); Anderson, 108 F.3d at 485.

As the court of appeals explained (Pet. App. 13a-15a), that interpretation of the meaning of "intent" as used in Section 2119 is not only well supported by the common-law understanding of "specific" intent, but also "comports with a reasonable interpretation of the legislative purpose of the statute" (id. at 15a).[3] As the court observed (ibid.), it is implausible that Congress intended the federal carjacking prohibition to cover "only those

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[3] There is no force to petitioner's argument (Pet. 15-16) that the court below violated due process by "expand[ing] the principles of criminal liability which exist in the federal courts" or attempting to create a "federal common law of crimes." The court merely interpreted the word "intent" as Congress used it in a federal criminal statute. The proper interpretation is, of course, informed by the common-law background against which Congress acted (see, e.g., United States v. Wells, 117 S. Ct. 921, 927 (1997)), but the exercise remains one of statutory construction. Moreover, there is nothing "novel"(Pet. 15) about the concept of "conditional" intent. See, e.g., United States v. Arrellano, 812 F.2d 1209, 1211 n.2, as amended, 835 F.2d 235 (9th Cir. 1987) ("[C]onditional intent is still intent. If, for example, a defendant breaks into a woman's house intending to rape her if she is there, he has committed a burglary whether or not she is in fact there"); United States v. Marks, 29 M.J. 1, 3 (C.M.A. 1989); United States v. Dworken, 855 F.2d 12, 18 (1st Cir. 1988) (attempt and conspiracy); Shaffer v. United States, 308 F.2d 654 (5th Cir. 1962) (conditional intent to do bodily harm in prosecution for assault under 18 U.S.C. 113), cert. denied, 373 U.S. 939 (1963); People v. Connors, 253 Ill. 266, 272-280 (Ill. 1912); see also W. Lafave and A. Scott, Substantive Criminal Law § 3.5(d), at 312 (1986); Model Penal Code § 2.02(6).

carjackings in which the carjacker's sole and unconditional purpose * * * was to kill or maim the victim." See also Williams, 1998 WL 50,191, at *3-*4; Romero, 122 F.3d at 1339 ("Congress did not intend for death or serious bodily injury to be a prerequisite to every carjacking conviction."); Anderson, 108 F.3d at 483. That is especially evident in light of the enhanced penalties that Congress expressly provided for crimes that do result in serious injury or death. Ibid.; see 18 U.S.C. 2119 (2) and (3).

Similarly, a rule requiring "unconditional" intent to kill or harm would make little sense in light of Section 2119's prohibition against taking a vehicle "by force and violence or by intimidation" (emphasis added). That language makes clear that Congress intended to punish crimes in which successful threats obviate any need for the carjacker to resort to actual force; yet those crimes would lie beyond the reach of the statute under petitioner's proposed requirement of "unconditional" intent to cause death or bodily harm. Indeed, because it would be difficult to prove such an "unconditional" intent in any case in which the carjacker did not in fact do violence to the victim, petitioner's argument would essentially read the phrase "or by intimidation" out of Section 2119.

2. As petitioner points out (Pet. 10-11), there is considerable tension between the reasoning of the decisions in this case, Williams, Anderson and Romero and that of United States v. Randolph, 93 F.3d 656 (9th Cir. 1996). See also Pet. App. 16a n.4. In Randolph, the Ninth Circuit stated that a "mere conditional intent to harm a victim if she resists is simply not enough to

satisfy § 2119's new specific intent requirement," and that the government must "prove that the causation of 'death or serious bodily harm' was the defendant's actual intent." 93 F.3d at 665. Both Randolph's reasoning and its result are incorrect.

Randolph turned, however, not only on erroneous reasoning, but on unusual facts. As the court explained (see 93 F.3d at 658-659), although Randolph pointed a gun at his victim, she was assured from the outset that she would not be harmed if she did as she was told. Randolph dropped the victim off, unharmed, some way out of town, and he denied any complicity in his accomplices' decision to pick her up again, drive her further away, and then beat her severely before releasing her. Randolph "consistently denied having any intention to kill or to harm [the victim], and insisted that the group's plan was merely to rob, not to harm anyone." Id. at 659. Indeed, he specifically claimed that, while he brandished a rifle in order to intimidate the victim, "he had no intention of actually using the firearm, even had she resisted." Ibid.

Randolph's conviction should have been affirmed, either because his conduct posed a sufficient (and sufficiently obvious) risk of injury or death to satisfy the intent element of Section 2119, whatever his own hopes for how the crime would proceed, or because the district court that convicted him was entitled to believe, despite his protestations to the contrary, that he was personally prepared to harm or kill his victim had she resisted his demands. Nonetheless, the facts of the case are so unusual that a court might have concluded that Randolph's conduct, in contrast to

that of his accomplices, clearly demonstrated an actual intent to avoid harm to his victim – the rare sort of case that might justify acquittal even under a standard requiring only criminal recklessness, and certainly would require acquittal under the "conditional intent" standard applied in this case, Williams, Romero and Anderson.

It is therefore difficult to predict, based solely on the decision in Randolph, how the Ninth Circuit will approach other carjacking cases with more typical facts, like those at issue here. Compare United States v. Hicks, 103 F.3d 837, 842-844 (9th Cir. 1996) (upholding admission under pre-amendment language of evidence concerning rape and murder during course of carjacking, and stating that new "intent" language would not change the result), cert. denied, 117 S. Ct. 1483 (1997); United States v. Arrellano, 812 F.2d 1209, 1211 n.2, as amended, 835 F.2d 235 (9th Cir. 1987) (although conditional intent to kill victim if she refused request for money might support conviction for transporting firearm with intent to commit a felony, "the jury made no finding as to intent, so we are unable to imply any finding as to conditional intent either"). If that court adheres to Randolph and extends its reasoning to the logical extreme, it may be necessary for this Court to grant review in an appropriate case to correct the error. Review would be premature, however, until the Ninth Circuit has had a chance to consider the relevant issues in a case with more typical facts, and in light of the intervening decisions in this case, Williams, Anderson and Romero.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1998

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1877—August Term, 1996

(Argued June 25, 1997 Decided September 16, 1997)

Docket No. 96-1563

UNITED STATES OF AMERICA,

Appellee,

—v.—

TEDDY ARNOLD; CHARLES ROBINSON; DARREL JONES; DAVID VALENTINE; PAUL SCAGLIONE; and JEFFREY DRAKE,

Defendants,

FRANCOIS HOLLOWAY a/k/a ABDU ALI,

Defendant-Appellant.

Before:

MCLAUGHLIN and MINER, *Circuit Judges*, and SCULLIN, *District Judge*.[1]

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[1] The Honorable Frederick J. Scullin, Jr. of the United States District Court for the Northern District of New York, sitting by designation.

Appeal from a judgment entered in the United States District Court for the Eastern District of New York (Gleeson, J.) convicting defendant, following a jury trial, of conspiracy to operate a "chop shop," operation of a chop shop, three counts of carjacking, and three counts of using a firearm in the commission of a crime of violence.

Affirmed.

Judge Miner dissents in a separate opinion.

KEVIN J. KEATING, Esq., Law Office of Kevin J. Keating, Garden City, New York, *for Defendant-Appellant*.

DOLAN L. GARRETT, Assistant United States Attorney, Brooklyn, New York (Zachary W. Carter, United States Attorney, Eastern District of New York, Brooklyn, New York, of counsel), *for Appellee*.

SCULLIN, *District Judge*:

Defendant-Appellant Francois Holloway appeals from a judgment entered in the United States District Court for the Eastern District of New York (Gleeson, J.), following a jury trial, convicting Holloway of numerous offenses connected with his participation in several carjackings in Queens, New York. Holloway was convicted of one count of conspiracy to operate a "chop shop" in violation of 18 U.S.C. § 371 (count one); one count of operating a chop shop in violation of 18

U.S.C. § 2322 (count two); three counts of carjacking in violation of 18 U.S.C. § 2119 (counts seven, nine, and eleven); and three counts of using a firearm in the commission of a crime of violence in violation of 18 U.S.C. § 924(c) (counts eight, ten, and twelve). Holloway was sentenced to 60 months on count one; 151 months on count two, to run concurrently with count one; 151 months on each of counts seven, nine, and eleven, to run concurrently with each other and counts one and two; 5 years on count eight, to run consecutively; and 20 years each on count ten and count twelve, each to run consecutively. Defendant was also sentenced to terms of supervised release and a special assessment of $400.

On appeal, Holloway contends that: (1) the district court erroneously charged the jury on the intent element of the carjacking statute; (2) his trial counsel rendered constitutionally ineffective assistance; and (3) the trial court improperly imposed consecutive sentences pursuant to Holloway's firearm convictions.

BACKGROUND

Holloway's conviction stems from his involvement in a "chop shop" operation located at 115th Drive in Queens, New York. In September 1994, Teddy Arnold recruited his son, Vernon Lennon, to begin stealing cars to be taken to the chop shop for dismantling. Lennon, in turn, recruited two individuals, David Valentine and Holloway, to assist him in his car thefts. The co-conspirators agreed that they should use a firearm during their thefts, and Lennon showed both Valentine and Holloway a .32 caliber revolver he intended to use for that purpose.

The first charged carjacking involving Holloway and Lennon occurred in October 1994. On October 14, Holloway and Lennon followed a 1992 Nissan Maxima driven by sixty-

nine year-old Stanley Metzger. When Metzger stopped and parked across from his residence, Lennon approached Metzger and pointed his revolver at him, demanding his car keys. At first, Metzger gave his house keys to Lennon, who rejected them and demanded his car keys. Metzger testified that Lennon told him, "I have a gun. I am going to shoot." Thereafter, Metzger surrendered his keys and also his money, and Lennon drove away in the Maxima.

The following day, Lennon and Holloway followed a 1991 Toyota Celica driven by Donna DiFranco. When DiFranco parked, Lennon approached her, leveled his gun at her, and demanded her money and her car keys. After DiFranco disengaged the car alarm and unlocked her "club" securing the steering wheel, Lennon drove off in her car.

That same day, Holloway and Lennon followed a 1988 Mercedes-Benz driven by Ruben Rodriguez until he parked near his home at Jamaica Estates. Both Lennon and Holloway approached the driver this time. Rodriguez, sensing something was wrong, retreated to his car. Lennon produced his gun and threatened, "Get out of the car or I'll shoot." Rodriguez complied and Lennon demanded his money and car keys. When Rodriguez hesitated, Holloway punched him in the face. Rodriguez surrendered the items and fled on foot, yelling for help. Lennon drove off in the Mercedes, and Holloway followed in another car.

At trial, the Government also presented evidence of two additional uncharged carjackings involving Lennon and Holloway. One involved the theft of a 1987 Nissan Maxima which was stolen from Betty Eng as she parked in her driveway on October 12, 1994. The other uncharged carjacking occurred on October 19, 1994. On that day, Holloway and Lennon attempted to steal a 1994 Nissan Sentra from Sara Markett when she parked her car on 193rd Street in Queens.

Lennon threatened Markett, telling her, "Give me your keys or I will shoot you right now." Thereafter, Markett surrendered her keys and ran screaming into a nearby hair salon. The theft was foiled by an off-duty police officer, Adam Lamboy, who happened to be in the hair salon at that time. Upon seeing Lennon in Markett's car, Lamboy yelled, "Police, don't move." Lennon made a motion toward his waist band prompting Lamboy to draw his weapon. Lennon then fled to a red Toyota driven by Holloway, and the two escaped.

On November 22, 1994, two of the carjacking victims, Ruben Rodriguez and Sara Markett, identified Holloway as one of the carjackers in a police line-up. Following his identification, Holloway confessed to the police that he had participated with Lennon in three carjackings involving a silver Mercedes-Benz, a black Nissan Maxima, and a gray Nissan. Immediately prior to trial, Lennon pled guilty to several carjacking charges and eight automatic teller machine ("ATM") robberies. Thereafter, Lennon testified at trial as a government witness. Lennon testified as to the events set forth in the above carjackings, as well as seven additional carjackings in which he participated with Valentine. Lennon testified that his plan was to steal the victims' cars without harming the victims; however, Lennon also testified that he would have used the gun if one of the victims had given him "a hard time" or had resisted.

The Government also presented testimony at trial from Rodriguez, Metzger, DiFranco, Eng, and Lamboy. These witnesses presented factually consistent testimony depicting the various carjackings as set forth above. With the exception of Rodriguez, none of the victims was injured during the course of the carjackings, and Rodriguez did not require medical attention.

The defense declined to call any witnesses. Over the objection of defense counsel, Judge Gleeson charged the jury on the doctrine of conditional intent, as it applied to the intent element for the carjacking offenses. Judge Gleeson instructed the jury that an intent to cause death or serious bodily harm conditioned on whether the victims surrendered their cars was sufficient to satisfy the specific intent requirement of the statute. As stated, the jury found Holloway guilty on all eight counts charged in the indictment.

Following the verdict, Holloway moved for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, or in the alternative, for reconsideration of his unsuccessful Rule 29 motion. *See United States v. Holloway*, 921 F. Supp. 155, 156 (E.D.N.Y. 1996). Holloway argued that the Court erred in charging the jury on conditional intent in light of the carjacking statute's unambiguous specific intent requirement, which requires a carjacker to have the intent to cause death or serious bodily harm in order to be culpable.

In a decision issued on April 5, 1996, Judge Gleeson denied Holloway's post-trial motion. On August 16, 1996, Holloway was sentenced, and, on August 28, 1996, judgment of conviction was entered. This appeal followed.

DISCUSSION

Holloway raises three issues on appeal: (1) whether Judge Gleeson erred in instructing the jury on "conditional intent"; (2) whether the performance of Holloway's trial counsel was constitutionally deficient so as to require reversal and a new trial; and (3) whether Judge Gleeson abused his discretion by sentencing Holloway to consecutive sentences pursuant to 18 U.S.C. § 924(c).

I. *Conditional Intent Instruction*

Holloway maintains that Judge Gleeson committed reversible error by charging the jury on the doctrine of "conditional intent." Holloway contends that: (1) the federal carjacking statute clearly and unambiguously requires that a defendant possess a specific intent to cause death or serious bodily harm (hereinafter "specific intent to kill"), and (2) conditional intent, by definition, does not satisfy this requirement.

A. 1994 Amendments to the Carjacking Statute

Holloway argues that the statute, as amended, is clear and unambiguous on its face, thus preventing the trial court, or this Court for that matter, from inquiring into the intent of Congress or ascribing some alternate construction of the statute based on any perceived error in drafting. *See Rubin v. United States*, 449 U.S. 424, 430, 66 L. Ed. 2d 633, 101 S. Ct. 698 (1981).

Prior to the 1994 Amendments, the federal carjacking statute, 18 U.S.C. § 2119, read as follows:

> Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—
>
> (1) be fined under this title or imprisoned not more than 15 years, or both,
>
> (2) if serious bodily injury (as defined in section 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate section 2241

> or 2242 of this title) results, be fined under this title or imprisoned not more that 25 years, or both, and
>
> (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.

The Violent Crime Control and Law Enforcement Act of 1994 amended this statute in the following manner:

> (14) CARJACKING. —Section 2119(3) of title 18, United States Code, is amended by striking the period after "both" and inserting ", or sentenced to death."; and by striking ", possessing a firearm as defined in section 921 of this title," and inserting ", with the intent to cause death or serious bodily harm".

Pub. L. 103-322, § 60003(a)(14). With these revisions, the statute now reads:

> Whoever, *with the intent to cause death or serious bodily harm* takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—
>
> (1) be fined under this title or imprisoned not more than 15 years, or both,
>
> (2) if serious bodily injury (as defined in section 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242 of this title) results, be fined under this title or imprisoned not more that 25 years, or both, and
>
> (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, *or sentenced to death.*

18 U.S.C. § 2119 (1997) (emphasis added).

The amendments to the carjacking statute contained in the Violent Crime Control and Enforcement Law Act of 1994 came about as an attempt to expand the number of federal crimes subject to the death penalty. *See* 140 Cong. Rec. E857-03 (statement of Rep. Franks); 140 Cong. Rec. S12421-01, S12458 (statement of Sen. Nunn); 139 Cong. Rec. S15295-01, 15301 (statement of Sen. Lieberman). The thrust of the various early versions of the amendments was to add the death penalty as a sentencing option when death resulted from a carjacking, and also, in some versions, to eliminate the firearm requirement. *See* H.R. 4197, 103d Cong. § 125(h) (1994) (removed firearm requirement and added death penalty); H.R. 3355, 103d Cong. § 203(a)(15) (1993) (version as of October 19, 1993 removed the firearm requirement and added death penalty); H.R. 3355, 103d Cong. § 703(e) (1994) (version as of April 21, 1994 added the death penalty only). Congressional opposition to the amendments coalesced into two camps: those who opposed the death penalty in general, and those who opposed the expansion of federal criminal jurisdiction. *See* 140 Cong. Rec. S12309-02, S12311 (statement of Sen. Leahy contained in Conference Report on H.R. 3355); 140 Cong. Rec. H2322-02, H2325 (statement by Rep. Glickman on amendment introduced by Rep. Scott to remove the death penalty addition to the Violent Crime Control Act).

The insertion of the heightened intent requirement at issue here occurred at a relatively late stage in the legislative process—while the Act was under consideration in Conference Committee in the summer of 1994. *See* 140 Cong. Rec. H8772-03, H8819, H8872 (Conference Report on H.R. 3355 dated August 21, 1994). On September 13, 1994, the Act was signed into law. There is no indication in the Congressional Record as to the purpose of the late-added heightened intent requirement. However, it is clear from a review of legislative history that Congress intended to broaden the coverage of the

federal carjacking statute by the passage of the 1994 amendments, and that the application of the heightened intent requirement to all three of the carjacking categories was, in all likelihood, an unintended drafting error. *See* 139 Cong. Rec. S15295-01, 15301 (statement of Sen. Lieberman) ("This amendment will broaden and strengthen that law so our U.S. attorneys have every possible tool available to them to attack the problem."); 140 Cong. Rec. E857-03, E858 (extension of remarks by Rep. Franks) ("We must send a message to the criminal that committing a violent crime will carry a severe penalty. This legislation will make an additional 22 crimes including carjacking and drive-by shootings, subject to the death penalty.").

At least two courts have speculated that Congress probably intended the heightened intent requirement to apply only to cases where the carjacking resulted in death, that is, those cases falling under § 2119(3). *See United States v. Anderson*, 108 F.3d 478, 482-83 (3d Cir. 1997), *petition for cert. filed* (U.S., June 3, 1997) (No. 96-9338); *Holloway*, 921 F. Supp. at 158. *But see United States v. Randolph*, 93 F.3d 656, 660-61 (9th Cir. 1996). In support of this interpretation, these courts point to the initial wording of the 1994 amendment, *"Section 2119(3) of title 18, United States Code, is amended by . . . . ,"* as limiting language for the two specific changes set forth within. *See Anderson*, 108 F.3d 378-79 (quoting Pub. L. No. 103-322, § 60003(a)(14) (emphasis added); *see also Holloway*, 921 F. Supp. at 158.

Regardless of the actual intent of Congress in adding this amendment, the practical effect of adding this requirement is to severely limit the scope of conduct covered by the statute. The addition of the heightened intent requirement into the body of the carjacking statute limits federal jurisdiction over all carjacking offenses to only those in which death or serious bodily harm was intended. Notwithstanding that such a

result was unintended, the Court declines any invitation to redraft the statute—that is a task better left to the legislature.[2] Thus, the sole issue this Court must decide is whether the "specific intent to kill," as now reflected in 18 U.S.C. § 2119, encompasses a conditional intent, as defined by Judge Gleeson in his instruction to the jury.

B. Judge Gleeson's Instruction

In his instruction to the jury, Judge Gleeson charged, in relevant part:

> Evidence that the defendant intended to use a gun to frighten the victims is not sufficient in and of itself to prove an intent to kill or cause serious bodily harm. It is, however, one of the facts you may consider in determining whether the government has met its burden.
>
> You may also consider the fact that no victim was actually killed or seriously injured when you consider the evidence or lack of evidence as to the defendant's intent.
>
> In some cases, intent is conditional. That is, a defendant may intend to engage in certain conduct only if a certain event occurs.
>
> In this case, the government contends that the defendant intended to cause death or serious bodily harm if the alleged victims had refused to turn over their cars. If you find beyond a reasonable doubt that the defendant had such an intent, the government has satisfied this element of the offense.

[2] We note that since the 1994 amendments there have been several legislative initiatives introduced in Congress that seek to remove the intent portion of the carjacking statute. *See* The Violent Crime Control and Law Enforcement Act of 1995, S. 3, 104th Cong. § 717 (1995) (titled "Elimination of Unjustified Scienter Element for Carjacking"); Omnibus Crime Control Act of 1997, S. 3, 105th Cong. § 807 (1997) (titled "Elimination of Unjustified Scienter Element for Carjacking").

> If you find that the co-defendant, Vernon Lennon, acted with the intent to cause death or serious bodily injury, that is not sufficient. You must find that the defendant shared in that intent before you can conclude that this element has been satisfied.

Holloway argues that the above instruction was erroneous because it allowed the jury to convict him based on lesser mental state than is required by the carjacking statute. Holloway contends that the plain meaning of "specific intent to kill" does not include the lesser mental state of "conditional intent," because a conditional intent to kill is no more than a state of mind where death is a foreseeable event and, as such, is equivalent to a mental state of recklessness or depraved indifference. Holloway contends that such a lesser mental state plainly does not satisfy the intent requirement of the carjacking statute.[3]

The Court agrees that a conditional intent to cause death or serious bodily harm and "reckless indifference" both involve foreseeability; however, conditional intent requires a much more culpable mental state. A carjacker who plans to kill or use deadly force on a victim in the event that his victim fails to comply with his demands has engaged in willful and deliberate consideration of his actions. Under these circumstances, death is more than merely foreseeable, it is fully contemplated and planned for. Such a mental state is clearly distinguishable from the characterization of conditional intent advanced by Holloway, which only has the carjacker *aware* of a *risk* of death of which he chooses to disregard.

Holloway further argues that the Supreme Court case, *Tison v. Arizona*, 481 U.S. 137, 107 S. Ct. 1676 (1987), fore-

[3] Holloway cites to Second Circuit precedent which holds that proof of a reckless or wanton state of mind cannot constitute a specific intent to kill. *See, e.g., United States v. Kwong*, 14 F.3d 189, 194-95 (2d Cir. 1994).

closes the inclusion of conditional intent within the scope of an ordinary specific intent to kill. In *Tison*, co-defendants Raymond and Ricky Tison planned an armed jail break to free their father, Gary Tison, and another inmate from the Arizona State Prison. *Id.* at 139. After a successful escape from prison, a flat tire in their getaway car led to the stopping and theft of a family's car in the desert outside of Flagstaff, Arizona. *See id.* at 140. The defendants witnessed their father brutally execute the family who had been in the car. *See id.* at 141. The defendants were found guilty of aggravated felony-murder and sentenced to death. *See id.* at 142. In the context of reviewing a collateral attack on the imposition of the death penalty, the Supreme Court found that under the factual circumstances presented, the defendants lacked a "specific intent to kill," and at most had a culpable mental state of reckless indifference to human life. *Id.* at 152. Holloway seizes on this language, characterizing conditional intent as an analogous mental state to that ascribed to the defendants in *Tison*. Holloway argues that, at best, the proof shows that he and Lennon shared a conditional intent to kill, which only meant that it was foreseeable that death could result from their various carjackings.

The facts of *Tison* are plainly distinguishable from the case at bar. In *Tison* some violence was foreseeable to the defendants in effecting the jailbreak, however, the murders for which the defendants were convicted were precipitated by a completely unplanned event, the flat tire in the desert. Thus, while it may have been foreseeable to them that death would occur in the course of the escape, the murders that flowed from their breakdown in the desert were not the result of a willful and deliberate plan.

Furthermore, the inclusion of a conditional intent to harm within the definition of specific intent to harm is a well-established principle of criminal common law. In his decision

denying Holloway's Rule 33 motion, Judge Gleeson cited to state criminal law authority as support for his conditional intent charge. *See Holloway*, 921 F. Supp. at 159 (citing W.R. LaFave and A.W. Scott, Jr., *Handbook on Criminal Law* § 28 at 200 (1972); Model Penal Code § 2.02(6) (American Law Institute); *People v. Connors*, 253 Ill. 266, 97 N.E. 643 (1912); *Hairston v. Mississippi*, 54 Miss. 689 (1877)). Following his decision, the Third Circuit in *United States v. Anderson* cited to Judge Gleeson's opinion with approval, finding that "conditional intent" was included within the specific intent required by the carjacking statute. 108 F.3d at 483, 485. The *Anderson* court also cited to additional authority confirming this principle of criminal law, including the incorporation of the doctrine of conditional intent into some state penal codes. *See* Del. Code Ann. tit. 11 § 254 (1996) ("The fact that a defendant's intention was conditional is immaterial unless the condition negatives the harm or evil sought to be prevented by the statute defining the offense."); 18 Pa. Cons. Stat. Ann. 18 § 302(f) (West 1997) ("Requirement of intent satisfied if intent is conditional—When a particular intent is an element of an offense, the element is established although such intent is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense."); Haw. Rev. Stat. § 702-209 (1996) ("When a particular intent is necessary to establish an element of an offense, it is immaterial that such intent was conditional unless the condition negatives the harm or evil sought to be prevented by the law prohibiting the offense."); *see also Shaffer v. United States*, 308 F.2d 654, 654-55 (5th Cir. 1962); *People v. Vandelinder*, 481 N.W.2d 787, 788-89 (Mich. Ct. App. 1992); *Commonwealth v. Richards*, 293 N.E.2d 854, 860 (Mass. 1973). *But see State v. Irwin*, 285 S.E.2d 345, 349 (N.C. Ct. App. 1982).

This Court also finds ample persuasive authority supporting the inclusion of conditional intent within the scope of the specific intent requirement. *See People v. Thompson*, 209 P.2d 819, 820 (Cal. Ct. App. 1949); *People v. Henry*, 190 N.E. 361, 361-62 (Ill. 1934); *Johnson v. State*, 605 N.E.2d 762, 765 (Ind. Ct. App. 1992); *Gregory v. State*, 628 P.2d 384, 386 (Okla. Crim. App. 1981); *see also* 40 Am. Jur. 2d Homicide § 571 (1968) ("The question whether an assault accompanied by a threat to kill unless a demand is complied with is an assault with intent to kill or murder has generally been answered in the affirmative . . . ."). Furthermore, and most importantly, incorporating conditional intent within the specific intent language of the carjacking statute comports with a reasonable interpretation of the legislative purpose of the statute. The alternative interpretation would have the federal carjacking statute covering only those carjackings in which the carjacker's sole and unconditional purpose at the time he committed the carjacking was to kill or maim the victim. Such an interpretation would dramatically limit the reach of the carjacking statute. "It is well-established that 'in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and its object and policy.' " *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313 (2d Cir. 1995) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51, 107 S. Ct. 1549, 1554 (1987)). A statute should not be literally applied if it results in an interpretation clearly at odds with the intent of the drafters. *See id.* While the Court cannot and should not rewrite a poorly drafted statute, it has an obligation to interpret a statute so as to give it reasonable meaning.

After reviewing the substantial body of state law addressing this issue, and the clear legislative purpose of 18 U.S.C. § 2119, the Court finds that an intent to kill or cause serious bodily harm conditioned on whether the victim relinquishes his or her car is sufficient to fulfill the intent requirement set

forth in the federal carjacking statute.[4] *Accord Anderson*, 108 F.3d at 485. As such, we accept the well-reasoned opinion of the court below, and hold that Judge Gleeson did not err when he instructed the jury on conditional intent.

II. *Ineffective Assistance of Counsel*

Holloway's second ground for appeal is that he received constitutionally ineffective assistance of counsel, requiring the reversal of his conviction and a new trial. Holloway argues that even though his defense counsel relied on a legally sound argument premised on the lack of specific intent, once Judge Gleeson rejected his argument, Holloway's conviction was a foregone conclusion. Holloway argues that his trial counsel should have presented his specific intent defense, while at the same time vigorously contesting the evidence concerning all of the other elements in question.

Claims for ineffective assistance of counsel are analyzed under the framework set forth in *Strickland v. Washington*, 466 U.S. 668, 686 (1984), which requires that a defendant show "(1) that his attorney's performance fell below an 'objective standard of reasonableness,' and (2) that 'there is

[4] The Ninth Circuit seemingly came to the opposite conclusion in *United States v. Randolph*, 93 F.3d 656, 665 (9th Cir. 1996), when it stated, "[t]he mere conditional intent to harm a victim *if* she resists is simply not enough to satisfy § 2119's new specific intent requirement." However, in *Randolph* the only evidence of intent was a threat made by one of the defendants to the victim that " 'she would be okay' if she '[did] what was told of her.' " *Id.* The Ninth Circuit held that "more than a mere threat is required to establish a specific intent to kill or harm." *Id.* We agree with the Ninth Circuit that without more, a mere threat of harm is not sufficient to establish a specific intent to kill. In fact, Judge Gleeson so charged in his jury instruction.

We do, however, disagree with the Ninth Circuit's dicta that equated a threat of harm to conditional intent. *See id.* The court stated, "[the defendant's] threat was tantamount to a conditional intent to harm." *Id.* While a threat is certainly evidence of a conditional intent to harm, conditional intent is not equivalent to a threat, it is much more. Conditional intent implies some indication that the defendant means to make good on his threat to harm. An *idle* threat can never constitute an intent to kill.

a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Kieser v. New York*, 56 F.3d 16, 18 (2d Cir. 1995) (quoting *Strickland*, 466 U.S. at 688, 694).

Even if Holloway could establish the first prong of the *Strickland* test, he has not met his burden on the second prong. The trial counsel's "intent" defense was appropriately directed at the most questionable aspect of the Government's case. Trial counsel's strategy to concede the other elements of the offense was reasonable in light of the overwhelming evidence in the case, i.e., Lennon's testimony that Holloway assisted him in the carjackings, several victims' identification of Holloway, and Holloway's own confession. Holloway's assertion that the outcome of the trial would have somehow been different had his trial counsel more vigorously contested this testimony is conclusory and unpersuasive given the record before the Court. As such, Holloway's appeal in this respect lacks merit.

III. *Imposition of Consecutive Sentences*

Finally, Holloway contests the imposition of consecutive sentences on his firearm convictions pursuant to 18 U.S.C. § 924(c). Holloway concedes that this Court has already held in *United States v. Mohammed* that issuing consecutive sentences under the carjacking statute and the firearm statutes based on the same carjacking is constitutionally permissible. 27 F.3d 815, 820-21 (2d Cir. 1994). However, Holloway argues that because the trial court lowered the standard of proof for carjacking by allowing a verdict based on conditional intent, then the trial court should be precluded from imposing consecutive sentences based on those offenses. The Court finds this argument to be wholly without merit.

CONCLUSION

Based on the foregoing, we affirm the judgment of the district court.

MINER, *Circuit Judge*, dissenting:

Because I perceive no basis in the plain language of the statute or in the legislative history for an element of conditional intent in the crime under examination here, I respectfully dissent.

As originally cast, the carjacking legislation established as a federal crime the taking or attempted taking of a motor vehicle having some connection with interstate commerce from the person or presence of another by force, violence or intimidation on the part of one possessing a firearm. *See* 18 U.S.C. § 2119 (prior to 1994 Amendment). Enhanced penalties for the infliction of serious bodily injuries or resulting death were provided. *See id.* § 2119(2), (3). The statute after amendment defines the crime as the taking or attempted taking of a motor vehicle having some connection with interstate commerce from the person or presence of another by force or violence on the part of one who intends to cause death or serious bodily harm. *See id.* (as amended). The penalty if death results is further enhanced to include the death penalty. *See id.* § 2119(3). The distinctions to be made between the original and the amended statute are clear: the firearm possession requirement is deleted; a specific intent element is added; and the penalty provision is expanded.

Despite the foregoing, my colleagues approve the district court's failure to instruct the jury as the statute requires regarding the specific intent to cause death or serious bodily harm, and further approve the following substituted instruc-

tion, which allows for conviction on proof of conditional intent:

> In this case, the government contends that the defendant intended to cause death or serious bodily harm *if the alleged victims had refused to turn over their cars*. If you find beyond a reasonable doubt that the defendant had such an intent, the government has satisfied this element of the offense.

(Emphasis added.) What is the provenance of such an instruction? It surely is not the language of the statute itself. It is not even the indictment, for the indictment parrots the statute. The district court therefore was wrong in charging the jury that the government had advanced a conditional intent contention.

In arriving at their conclusion, my colleagues first turn to the legislative history and properly note that the amendment to the carjacking statute represented an effort to expand the number of crimes subject to the death penalty, including carjacking where death results. There is also an indication of an intent on the part of Congress to eliminate the firearm requirement. Ultimately, as all agree, the heightened intent requirement was added to the final amending legislation by the Congressional Conference Committee. There is no discernible information on why or how this element was added.

How, then, can it be said that "it is clear from a review of legislative history that Congress intended to broaden the coverage of the federal carjacking statute by the passage of the 1994 amendments, and that the application of the heightened intent requirement to all three of the carjacking [penalty] categories was, in all likelihood, an unintended drafting error[?]" Maj. Opn. at 8. No member of Congress has ever referred to "an unintended drafting error," and the congressional intent may well have been to narrow in some respects, as well as broaden in some respects, the statute's coverage.

The scienter requirement of the amended statute has been interpreted in different ways. While one circuit court thinks that Congress intended the specific intent provision to apply only where the carjacking resulted in death, *see United States v. Anderson*, 108 F.3d 478, 482 (3d Cir. 1997), another circuit court considers that the purpose of the amendment was to convert the entire general intent offense to a specific intent offense, *see United States v. Randolph*, 93 F.3d 656, 661 (9th Cir. 1996). But we have no authority to correct an "unintentional drafting error" where there is no reason to say that there is an "error" or that the statutory provision inserted is "unintended." By adding a conditional intent element to correct what the court perceives to be an error, we ignore the teaching of the Supreme Court that "[to] supply omissions transcends the judicial function." *Iselin v. United States*, 270 U.S. 245, 251 (1926), *quoted in West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 101 (1991).

We do know that since the enactment of the 1994 amendment to the carjacking statute, Congress has made at least three attempts to eliminate what was termed the "unjustified scienter element for carjacking." Omnibus Crime Control Act of 1997, S. 3, 105th Cong. § 807; Violent Crime Control and Law Enforcement Improvement Act of 1995, S. 3, 104th Cong. § 717 ("VCCLEIA"); *see* Anti-Gang and Youth Violence Control Act of 1997, S. 362, 105th Cong. § 2113 ("AGYVCA"). These statutes would eliminate entirely the requirement that the government prove that the defendant possessed the intent to cause death or serious bodily harm. *See, e.g.*, VCCLEIA § 717 ("Section 2119 of title 18, United States Code, is amended by striking ', with the intent to cause death or serious bodily harm'."). It is unclear what happened to the earlier attempts to remove the intent element

from § 2119, but the AGYVCA, the most recent effort, presently appears to be before the Senate Judiciary Committee.

The only discussion we have concerning the attempts to remove the intent element comes from Senator Leahy's comments in introducing the AGYVCA. The Senator explained:

> Prior to the enactment of [the Violent Crime Control and Law Enforcement Act], the offense applied only if the defendant possessed a firearm. Section 60003(a)(14) of that law appropriately deleted the firearm requirement, as had been proposed in the Senate-passed bill, but in conference a new scienter element was added that the defendant must have intended to cause death or serious bodily injury. This unique new element will inappropriately make carjackings difficult or impossible to prosecute in certain situations. . . . The new requirement . . . will likely be a fertile [source] of argument for defendants in cases in which no immediate threat of injury occurs, such as where a defendant enters an occupied vehicle while it is stopped at a traffic light and physically removes the driver. Even when a weapon is displayed, the defendant may argue that although it was designed to instill fear, he had no intent to harm the victim had the victim in fact declined to leave the car.

143 Cong. Rec. S1659, S1661-62 (Feb. 26, 1997) (statement of Sen. Leahy).

Aside from the fact that Senator Leahy's comments represent the views of only one member of Congress, there is nothing in those comments to indicate that the "scienter element," as he calls it, was not intentionally placed in the statute when the 1994 Amendment was enacted. He is saying only that the element should be taken out. But, so far, his colleagues have not agreed that this should be done.

In this regard, it is of more than passing interest that carjacking is essentially a state offense, and it may well be the intent of Congress to limit the scope of the federal offense. *See generally* Geraldine Szott Moohr, *The Federal Interest in Criminal Law*, 47 Syracuse L. Rev. 1127 (1997). Several states have enacted specific carjacking statutes. *See, e.g.*, Fla. Stat. § 812.133 (1994); Md. Code Ann., Crimes and Punishments § 348A (1996); Miss. Code Ann. § 97-3-117 (1994); Va. Code Ann. § 18.2-58.1 (Michie 1996). The common elements of each of these statutes are the taking of a motor vehicle by threat of force or violence. *See, e.g.*, S.C. Code Ann. § 16-3-1075(B) (Law Co-op. Supp. 1996) ("A person is guilty of the felony of carjacking who takes, or attempts to take, a motor vehicle from another person by force and violence or by intimidation while the person is operating the vehicle or while the person is in the vehicle."). Some states also have enacted specific armed carjacking statutes to address carjackings in which a dangerous weapon is used. *See, e.g.*, D.C. Code Ann. § 22-2903(b)(1) (1996).

Those states that do not have a specific carjacking statute, such as New York, prosecute carjackings under the state's robbery statute. *See, e.g.*, *Kansas v. Vincent*, 908 P.2d 619, 621 (Kan. 1995) (defendant charged with felony murder, conspiracy to commit robbery and aggravated robbery in relation to a carjacking resulting in death); *New York v. Lee*, 652 N.Y.S.2d 2, 3 (App. Div. 1st Dep't 1996) (defendant charged with first degree robbery in the gunpoint theft of a car). As with the specific carjacking statutes, these robbery statutes apply to thefts involving the use of threat or force. *See, e.g.*, N.Y. Penal Law § 160.10(3) (McKinney 1997) ("A person is guilty of robbery in the second degree when he forcibly steals property and when . . . [t]he property consists of a motor vehicle . . . ."). Thus, even where there is no specific

carjacking statute, carjackings can be prosecuted adequately under state law.

Ultimately, my colleagues seem to reject the legislative intent approach, saying that "[n]otwithstanding that such a result was unintended, the Court declines any invitation to redraft the statute –that is a task better left to the legislature." Maj. Opn. at 9. (But that in fact is what they have done here.) The majority opinion goes on to find a conditional intent implicit in the carjacking statute as amended, but there is absolutely no basis for such a construction. The intent required is spelled out explicitly in the statute. The other reason assigned for reading conditional intent into the statute—that "the inclusion of a conditional intent to harm within the definition of specific intent to harm is a well-established principle of criminal common law," Maj. Opn. at 12—is irrelevant here. There is no federal common law of crimes, *see United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812), state criminal law supplies no authority for interpreting a federal criminal statute, and the Model Penal Code, cited in the majority opinion, never has been adopted by Congress. In point of fact, I can find no federal criminal statute that provides conditional intent as an element of the crime defined. Nor is there a general provision in the Federal Criminal Code, as there is in some state criminal codes, that the requirement of intent is satisfied by proof of conditional intent. *See, e.g.*, Haw. Rev. Stat. § 702-209 (1993) ("When a particular intent is necessary to establish an element of an offense, it is immaterial that such intent was conditional unless the condition negatives the harm or evil sought to be prevented by the law prohibiting the offense.")

To avoid a clear judicial usurpation of congressional authority, I would reverse and remand for a retrial upon instructions conforming with the foregoing analysis.

MANDATE

EDNY-BKLYN
95-CR-78
GLEESON

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the sixteenth day of September, one thousand nine hundred and ninety-seven.

PRESENT: JOSEPH M. McLAUGHLIN,
ROGER J. MINER,
Circuit Judges,
FREDERICK J. SCULLIN,
District Judge.

Docket No. 96-1563

UNITED STATES OF AMERICA,
Appellee,

v.

TEDDY ARNOLD; CHARLES ROBINSON; DARREL JONES; DAVID VALENTINE; PAUL SCAGLIONE; and JEFFREY DRAKE,
Defendants,

francois holloway a/k/a ABOU ALI,
Defendant-Appellant.

Appeal from a judgment of the United States District Court for the Eastern District of New York,

This matter came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued.

Upon consideration thereof, IT IS ORDERED that the judgment be, and it hereby is, AFFIRMED.

FOR THE COURT:
GEORGE LANGE III, Clerk
by: Beth J. Meador
Beth J. Meador, Administrative Attorney

*The Hon. Frederick J. Scullin, Judge of the United States District Court for the Northern District of New York, sitting by designation.

2ND CASE of Level 1 printed in FULL format.

UNITED STATES OF AMERICA, - against - FRANCOIS HOLLOWAY, also known as "Abdu Ali," Defendant.

95-CR-0078 (JG)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

921 F. Supp. 155; 1996 U.S. Dist. LEXIS 4905

April 5, 1996, Dated

COUNSEL: [**1] APPEARANCES:

ZACHARY W. CARTER, United States Attorney, Brooklyn, New York, By: Dolan L. Garrett, Assistant U.S. Attorney.

DANA HANNA, ESQ., Brooklyn, New York, Attorney for Defendant.

JUDGES: JOHN GLEESON, United States District Judge

OPINIONBY: JOHN GLEESON

OPINION: [*155] MEMORANDUM AND ORDER

JOHN GLEESON, United States District Judge:

Defendant Francois Holloway, also known as "Abdu Ali," was indicted on February 2, 1995. He was charged with conspiring to operate a "chop shop," in violation of 18 U.S.C. @ 371, operating a chop shop, in violation of 18 U.S.C. @ 2322, three counts of carjacking, in violation of 18 U.S.C. @ 2119, [*156] and three counts of using and carrying a firearm during and in relation to the charged carjackings, in violation of 18 U.S.C. @ 924(c). A jury trial was held in December 1995, after which Ali was found guilty of all charges.

Ali now moves for a new trial pursuant to Fed. R. Civ. P. 33, claiming that such relief is required in the interest of justice. In the alternative, he seeks reconsideration of his unsuccessful motion pursuant to Fed. R. Cr. P. 29, which he made at trial. The issue raised by the motion was also the central issue at the trial: what must the government prove [**2] to satisfy the intent element of the carjacking statute, 18 U.S.C. @ 2119? n1

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n1 Although Ali's motion purports to address all of the charges against him, none of his arguments addresses Counts One or Two (conspiracy to operate a chop shop and operation of a chop shop, respectively). Even if the challenges raised on this motion had merit, there would be no reason to set aside the jury's verdicts on those counts.

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There is no question that the conduct at issue in this case is precisely what Congress and the general public would describe as carjacking, and that

Congress intended to prohibit it in @ 2119. However, carelessness in the legislative process has produced a criminal statute that says something fundamentally different than what Congress obviously meant to say. As a result, Ali advances a colorable claim that his conduct here -- using a gun to terrorize motorists into giving up their cars -- is no longer prohibited by the carjacking statute. Indeed, it is likely that a 1994 amendment to the statute, [**3] which was explicitly intended to broaden the available penalties, in fact placed a large number of "carjackers" beyond its reach.

Ali, however, is not among them. Though colorable, his argument fails for the reasons set forth below, and his motion is denied.

A. The Facts

Vernon Lennon's father, Teddy Arnold, operated a "chop shop" in Queens, New York. Lennon stole cars for his father to chop. His father would tell him what year and model cars he needed, and Lennon would locate such cars and steal them. He did not know how to disable alarms or "hot wire" cars, so Lennon's modus operandi was to take the cars from their owners at gunpoint. Lennon was a team player, always taking another robber with him to help locate the target car and steal it. Since Lennon liked to follow a targeted car, often to the driver's home, before committing the robbery, a teammate was a virtual necessity; if the robbery was successful, there were two cars that had to be driven away.

Lennon has known the defendant Ali (whom Lennon knows as Francois Holloway) since they were boys. In approximately September 1994, he recruited Ali, who would hang around the chop shop, to steal cars with him. Lennon [**4] told Ali that Lennon would use a gun to steal the cars, and showed him the gun, a .32 caliber revolver. Ali agreed to help for a fixed fee per car stolen.

On October 14, 1994, Lennon and Ali stole a 1992 Nissan Maxima. They followed the car to the home of its driver, 69 year-old Stanley Metzger, in Queens. As Metzger got out of his car, Lennon and Ali got out of theirs. Lennon approached Metzger, pointed the gun at him, and demanded the keys. Metzger was apparently not fast enough in complying, so Lennon threatened to shoot him. Metzger handed over the keys, and was then told to hand over his wallet. He did so, and the robbers drove off with his car and his money.

On the next day, October 15, 1994, at approximately 8:00 p.m., Lennon and Ali spotted Donna DiFranco driving a 1991 Toyota Celica at the Whitestone Shopping Center in Queens. They followed her to her friend's house, and Lennon approached her after she exited her parked car. He pointed a gun at her and demanded her money and her car keys. She complied, and after some fumbling with the car alarm and an anti-theft device, Lennon and Ali took her car.

At approximately 10:00 p.m. on the same day, Lennon and Ali stole another [**5] car, a 1988 Mercedes Benz. They followed the victim, Ruben Rodriguez, to his home in the Jamaica Estates section of Queens. Both robbers got out of their car and approached Rodriguez, who had just stepped out of the Mercedes Benz. Lennon asked Rodriguez if he knew [*157] the location of a particular address. The address was, as Rodriguez put it, "way off base," and he knew "something was up." Rodriguez got back into his car and closed the door. Lennon pulled the gun and told him to get out of the car or he would be shot. Rodriguez got out of his car, and Lennon demanded his money as well as the keys. Rodriguez hesitated; his money was in a clutch bag on the passenger's seat, and he felt

he might be killed if he leaned into the car to get it. Frustrated by the delay, the defendant Ali punched Rodriguez in the face. Rodriguez reeled backwards from the punch and used that momentum to begin running away from the robbers, who fled with his car and his money.

On all three occasions, n2 Lennon and Ali intended to leave the victims unharmed. Lennon never fired the gun in any of the carjackings. An experienced criminal, he knew that if he did, he risked a lengthier prison term than he would receive [**6] for simply robbing the car. For each robbery, the plan was to use the firearm only to obtain possession of the car, not to shoot or otherwise harm the victim.

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n2 There was also evidence of two uncharged crimes committed by Ali with Lennon: one other successful carjacking and an attempted one that was aborted by the arrival of a police officer on the scene.

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However, in all three of the charged carjackings, Lennon was prepared to shoot the victims if their resistance made that necessary. In other words, he intended to kill or seriously injure the victims, but that intent was conditioned on their giving the robbers "a hard time." There was ample evidence from which a rational juror could infer that the defendant Ali shared that conditional intent.

B. The Carjacking Statute And Its 1994 Amendment

In September 1992, Paula Basu, a Maryland woman, had her car stolen from her by two men. The men forced her from her car and drove off. Because her infant daughter was in the car, Basu clung to it as the men [**7] drove away, and was dragged to her death.

This horrific offense generated a public outcry, and focused attention on legislative efforts to make car robberies a federal crime. Those efforts resulted in the Anti Car Theft Act of 1992, codified at 18 U.S.C. @ 2119. As initially enacted, this new federal offense read as follows:

Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall -

(1) be fined under this title or imprisoned not more than 15 years, or both,

(2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and

(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.

The subsections of the statute obviously related solely to punishment, and were not elements of the offense. They provided for enhanced penalties of up to 25 years if serious bodily injury resulted from the offense, [**8] and up to

life in prison if it resulted in death.

During 1993, Congress was considering extensive new criminal legislation, which included an array of new death penalties. Members of both houses proposed amendments to the newly-minted carjacking statute. The Senate bill proposed an amendment that would provide for the death penalty in cases where a carjacking results in death. S. 942, 103d Cong., 1st Sess. (1993). Senator Lieberman proposed a further amendment to this death penalty provision that would eliminate the requirement that such cases involve the use a firearm by the carjacker. In his remarks in support of his proposed amendment, Senator Lieberman observed:

If a carjacking occurs and a death occurs as a result of that, does it really matter whether a firearm was used, whether a knife was used, whether physical force was used, or whether a mother, as in the Basu case, was dragged to her death because [*158] she wanted to make every effort to save the life of her child?

...

In this case, the very bill I am amending has the death penalty for carjacking. All I am doing here is taking a small but I think significant additional step in saying, if the death penalty is going to [**9] be enacted into law for cases of carjacking where death occurs, then we ought not to require that that death has to involve a firearm. If the person in a carjacking is killed as a result of a knife or other weapon or just as a result of the carjacking, then the criminal ought to be subject to death himself. That is why I propose the amendment.

139 Cong. Rec. S15295, S15301, S15303 (1993) (statement of Sen. Lieberman).

Thus, with respect to carjackings resulting in death, the Senate bill eliminated the firearm requirement and provided for the death penalty. Because such a statute could authorize the death penalty for an accomplice who neither killed a victim nor intended to kill or harm the victim, it would have been subject to attack under the Eighth Amendment. See Enmund v. Florida, 458 U.S. 782, 73 L. Ed. 2d 1140, 102 S. Ct. 3368 (1982). Perhaps for that reason, the conference report for the bill modified the Senate death penalty amendment for carjacking by adding an intent requirement -- the "intent to cause death or serious bodily harm." H.R. Rep. No. 103-694, 103d Cong., 2d Sess. (1994).

These combined efforts resulted in the following provision of the Violent Crime Control and Law Enforcement Act [**10] of 1994:

(14) CARJACKING - Section 2119(3) of title 18, United States Code, is amended b striking the period after "both" and inserting ", or sentenced to death."; and by striking ", possessing a firearm as defined in section 921 of this title," and inserting ", with the intent to cause death or serious bodily harm."

Violent Crime Control and Law Enforcement Act of 1994 (the "Act"), Pub L. No. 103-322, Title VI, @ 60003(a) (14), 108 Stat. 1796, 1970 (1994). The provision was intended to affect only carjackings resulting in death. That was the sole focus of the legislative debates. Moreover, the provision was included in Title VI of the Act, which was entitled the "Federal Death Penalty Act of 1994." The most powerful evidence of the limited purpose of the amendment is Congress'

obvious belief that it was amending only a penalty enhancement provision, not the statutory prohibition itself. Specifically, it purported to amend "@ 2119(3)," the subsection of the original (and existing) statute that is solely a penalty provision. Indeed, it is the penalty provision applicable to cases in which death results, which cases were, as noted, the only focus of the legislature's [**11] attention.

However, the possession-of-a-firearm requirement that the amendment eliminated was not, as the amendment mistakenly assumed, located in 2119(3). In fact, it was not in any of the three penalty provisions; rather, it was an element of the offense itself, a necessary ingredient of all carjacking prosecutions, not just those resulting in death. Thus, in its effort to eliminate the firearm requirement only in cases resulting in death, Congress enacted an amendment that, on its face, eliminates it in all cases. n3

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n3 It has been suggested that, notwithstanding the unequivocal language of the amended statute, the firearm requirement has only been eliminated when the carjacking results in death, and still must be proved in cases, like this one, that fall within @ 2119 (a) or (b). M. Michenfelder, The Federal Carjacking Statute: To Be Or Not To Be? An Analysis Of The Propriety Of 18 U.S.C. @ 2119, 39 St. Louis U.L.J. 1009 (1995). Perhaps because a firearm was used in this case, however, that strained argument has not been made here, and thus its merits need not be addressed.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - -

[**12]

Similarly, Congress intended to add a new intent element for cases in which the death penalty is sought. However, notwithstanding the amendment's stated intention to affect only the penalty provisions of @ 2119(3), it added the new element -- "the intent to cause death or serious bodily harm" -- to the first clause of @ 2119, and thus made it applicable to all violations of the statute.

As amended, the statute now reads as follows:

Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received [*159] in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall -

(1) be fined under this title or imprisoned not more than 15 years, or both,

(2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and

(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death.

In short, the 1994 amendment to the carjacking statute effected fundamental changes that [**13] Congress never intended. The elimination of the firearm requirement for all cases federalized approximately 14,000 additional cases each year. n4 At the same time that it inadvertently opened the door for all these cases, Congress inadvertently closed it substantially by unintentionally

imposing the specific intent requirement on the entire statute, not just in death penalty cases. n5

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n4 See Michenfelder, supra note 3, at 1012-13 (35,000 carjackings or attempted carjackings were committed during each of the years 1987-92, and firearms were used 50% of the time).

n5 The government does not contend, as it might have, that the specific intent required by the 1994 amendment is an element only in carjacking cases where death results and the death penalty is sought. For that reason and because I conclude Ali had the specific intent required by the statute in any event, I do not need to address that issue.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - -

C. Discussion

Ali urges a literal construction of the amended statute, contending that it [**14] prohibits only those carjackings in which the perpetrators unconditionally intend to kill or seriously injure their victims. Under this reading, the law would not prohibit the crimes committed by Ali and Lennon, where the intent of the carjackers was not to kill or injure people, but to get cars. Indeed, this reading would no doubt insulate from federal prosecution the large majority of carjackings, as carjackers generally do not intend to cause death or serious bodily injury, but in fact hope that the opposite will occur, i.e., that the victim will peaceably give up the car and suffer no harm at all.

Thus, if accepted, Ali's construction of the carjacking statute would drastically narrow its scope. Only those carjackers who intend not only to rob cars, but also to murder or seriously injure another, could be prosecuted. A person who intends to find a Mercedes Benz, shoot the owner and take the car could be prosecuted. A person who intends to find a Mercedes Benz and shoot the owner only if she refuses to give up her car could not, at least if the plan succeeds and the car is taken without the need to fire.

This would be an odd result. The statute would no longer prohibit the [**15] very crime it was enacted to address except in those unusual circumstances when carjackers also intended to commit another crime -- murder or a serious assault. Moreover, this result, if accepted, would be the ironic product of legislation that was intended "to broaden and strengthen [the carjacking statute] so our U.S. attorneys (sic) have every possible tool available to them to attack the problem." 139 Cong. Rec. S15295, S15301 (1993) (statement of Sen. Lieberman).

Ali's argument fails because his intent to aid and abet Lennon's use of the firearm if the victims resisted is sufficient. Where a crime is defined to require a particular intention, that element is satisfied even if the requisite intent is conditional, unless the condition negatives the evil sought to be prevented by the statute. W. R. Lafave and A. W. Scott, Jr., Handbook on Criminal Law, @ 28 at 200 (1972).

Although the issue of conditional intent is not raised very often, at least in the federal courts, it is not new. In People v. Connors, 253 Ill. 266, 97

N.E. 643 (Ill. 1912), the defendants held guns to members of a rival labor union and told them to take off their overalls or they would be shot. Although [**16] the workers complied, and there was no shooting, the defendants were convicted of assault with an intent to murder. 253 Ill. at 273. In upholding the conviction, the Supreme Court of Illinois held that the crime is "complete where it is shown that the assailant, with the [*160] present ability to destroy life or do great bodily harm, draws a dangerous weapon on another and threatens to kill him unless the party assailed complies immediately with some unlawful condition or demand. . . . The offense is complete even though commission of the felony is averted by the submission of the assailed party to the unlawful demands made upon him." Id. at 647-48.

Some conditions on intent may bring the conduct out of the reach of the statute. In Hairston v. Mississippi, 54 Miss. 689 (1877), Hairston attempted to remove the personal effects of a laborer from a plantation. When the plantation owner grabbed Hairston's mules to prevent him from removing the property, Hairston pointed a pistol at him and angrily threatened to "'shoot any G-d d--d man who attempts to stop my mules.'" Id. at 692. The plantation owner released the mules, and Hairston was convicted of assaulting him with intent to [**17] murder. The Supreme Court of Mississippi reversed the conviction. Because the plantation owner was trespassing on Hairston's property by grabbing his mules, the threat to shoot was conditioned on a demand Hairston had a right to make, and thus he could not be guilty of the offense.

Here, of course, there can be no doubt that the intent to shoot the victims was conditioned on a demand -- that they turn over their cars -- that Lennon and Ali had no right to make.

Not all instances of conditional intent involve demands by the defendant. A person may break into a house intending to rape its occupant if she is home, or to steal from it only if no one is home. Section 2.02(6) of the Model Penal Code provides as follows:

Requirement of Purpose Satisfied if Purpose Is Conditional. When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense.

See also United States v. Arrellano, 812 F.2d 1209, 1212 n.2 (9th Cir. 1987).

Viewed under this standard, the conditional nature of Ali's intent obviously does not help [**18] him. The evil sought to be prevented by @ 2119 in not "negatived" by the condition, it is the condition. Section 2119 is not a murder or assault statute, it is a car robbery statute.

Ali's argument on this motion relies in part on the premise that there was insufficient evidence from which a juror could find an intent on his part that recalcitrant victims be shot. However, as stated above, there was ample evidence from which a jury could infer that intent. Lennon told Ali that a gun would be used and showed him the gun. Lennon intended to shoot uncooperative victims, and threatened to do so in Ali's presence. Ali himself demonstrated a seriousness of purpose by punching one of the victims in the face simply because he hesitated in handing over his money. Ali makes much of the fact that there is no direct evidence of his intent, but there rarely is such evidence. The jury could readily have inferred it from the circumstances, and Ali thus cannot satisfy

his heavy burden of establishing the insufficiency of the evidence.

Finally, Ali's reliance on the rule of lenity is misplaced. Whether conditional intent is sufficient to establish the intent element of the carjacking offense [**19] is not a question of statutory construction, but o criminal law.

The jury instructions on the element of intent in the carjacking counts included the following:

In some cases, intent is conditional. That is, a defendant may intend to engage in certain conduct only if a certain event occurs. In this case, the government contends that the defendant intended to cause death or seriously bodily harm if the alleged victims had refused to turn over their cars. If you find beyond a reasonable doubt that the defendant had such an intent, the government has satisfied this element of the offense.

If you find that the co-defendant, Vernon Lennon, acted with the intent to cause death or serious bodily injury, that is not sufficient. You must find tha the defendant shared in that intent before you can conclude that this element has been satisfied. [*161] I remind you that you must consider each count separately.

In view of the foregoing, those instructions, and the charge as a whole, properly permitted the jury, if it accepted the government's evidence, to find Ali guilty of carjacking.

D. Conclusion

It is likely that many incidents of what both Congress and the general publi would [**20] call carjacking are no longer prohibited by @ 2119. Without doubt, some car robbers threaten death or serious bodily injury, but intend to flee the scene rather than escalate the confrontation if the demand for the car is rebuffed. A defendant with that state of mind may not be subject to prosecution under @ 2119, even if the threat succeeds and he robs the car.

However, because Ali had the specific intent required by the statute, albeit conditionally, his motion to set aside the verdicts and for a new trial is denied.

So Ordered.

JOHN GLEESON, U.S.D.J.

Dated: Brooklyn, New York

April 5, 1996

person and presence of another, by force and violence and by intimidation.

All three of these offenses, Count 7, Count 9, Count 11, call for the government to prove each of the following elements beyond a reasonable doubt.

First, that the defendant knowingly and willfully took or attempted to take a motor vehicle.

Second, that the defendant at the time of the taking, intended to cause death or serious bodily harm.

Third, that the taking of the motor vehicle was accomplished by force and violence or by intimidation.

Fourth, that the motor vehicle taken was transported, shipped or received in interstate commerce.

The first of these elements that the defendant knowingly took or knowingly attempted to take a motor vehicle. As I explained before to do something knowingly is to act purposely and voluntarily and not because of a mistake or accident or other innocent reason.

Now, the defendant need not have been aware of the specific law and rule that his conduct may have violated, but he must act with a specific intent to do whatever it is the law forbids, here take a motor vehicle by force, violence or intimidation.

The second element the government must prove beyond a reasonable doubt is that the taking was committed with the intent

to cause death or serious bodily harm. This requires you to make a determination about the defendant's state of mind at the time of the conduct in question. I've already discussed with you the fact that a person's intent can rarely be proved by direct evidence. You should consider the totality of the circumstances presented by the evidence before you.

The defendant's intent in committing the crime must have been to cause death or serious bodily harm. I remind you that intentional conduct is done willfully, with a bad purpose to do something the law forbids, in this case, to cause death or serious bodily harm to the person from whom the car was taken.

It is the defendant's theory of the case that the evidence fails to prove that he acted with intent to cause death or serious bodily harm.

If the government has failed to prove beyond a reasonable doubt that the defendant acted with the intent to kill or cause serious bodily harm to the particular victim, you must find him not guilty of that offense.

The defendant is entitled to the presumption of innocence with regard to all of the elements of the offense including this element. That is, you must presume that the defendant did not possess the intent to kill or cause serious bodily harm and you must continue to give the benefit of that presumption to the defendant unless and until it is proven beyond a reasonable doubt that the defendant intended to cause death or

serious bodily harm at the time of the events you are considering.

Evidence that the defendant intended to use a gun to frighten the victims is not sufficient in and of itself to prove an intent to kill or cause serious bodily harm. It is, however, one of the facts you may consider in determining whether the government has met its burden.

You may also consider the fact that no victim was actually killed or seriously injured when you consider the evidence or lack of evidence as to the defendant's intent.

In some cases, intent is conditional. That is, a defendant may intend to engage in certain conduct only if a certain event occurs.

In this case, the government contends that the defendant intended to cause death or serious body harm if the alleged victims had refused to turn over their cars. If you find beyond a reasonable doubt that the defendant had such an intent, the government has satisfied this element of the offense.

If you find that the co-defendant, Vernon Lennon, acted with the intent to cause death or serious bodily injury, that is not sufficient. You must find that the defendant shared in that intent before you can conclude that this element has been satisfied.

Let me also remind you, you must consider each count separately.

Serious bodily harm is defined to be "bodily injury" which involves substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of a bodily member, organ, or mental faculty.

This is to be distinguished from "bodily harm" which means cut, abrasion, bruise, burn, or disfigurement, physical pain or any other injury to the body, no matter how temporary.

Proof of intent to cause bodily harm as opposed to serious bodily harm is insufficient.

The third element the government must prove is that the taking of the motor vehicles were accomplished by force or violence or by intimidation.

The government can meet its burden on this element by proving beyond a reasonable doubt either that the defendant used force or violence or that the defendant acted in an intimidating manner, it need not prove both. The phrase "intimidating manner" means that the defendant said or did something that would make an ordinary person fear bodily harm or for the purpose of causing another person to fear bodily harm.

However, it is not necessary for the government to prove that the victim was actually frightened in order to establish that the defendant acted in an intimidating manner. Your focus should be on the defendant's behavior. Although the government does not have to show that the defendant's behavior caused or could have caused terror, the government does have to show that

written form, part of the charge.

I understood you to object to sending them the whole charge. That's why I am proceeding the way I intend to do now. I am afraid by sending, in written form, just part of it, I will undercut the bedrock principle that they should view all my instructions as a whole.

MR. HANNA: We would respectfully object to this, request that you send in the charge.

THE COURT: All right. Your request is denied.

Bring in the jury.

THE CLERK: All rise.

(11:30 - jury entered the courtroom).

THE COURT: Please be seated, everyone. Good morning, ladies and gentlemen. Everybody made it in okay eventually.

All right. At the end of the day yesterday, I received from you what's been marked as Jury Note 1: "Need a copy of the law as stated by the Judge on intent."

What I will do now is read to you the portions of the charge I gave you yesterday that relate to intent. There are two segments of the charge that respond to your note.

Let me remind you at the outset that although I intend to do that, let me remind you not to single out any one instruction, these ones included relating to intent, as alone stating the law. Rather, you should consider my instructions

a whole when you deliberate.

Now I instructed you regarding intent in two respects. First, regarding knowledge, and intent generally as opposed to in the context of the particular counts. Let me reread to you my instructions regarding knowledge and intent generally.

As a general rule, the law holds persons accountable only for conduct they intentionally engage in. Thus, in describing the various crimes that have been charged to you, I have on occasion explained, before you can find the defendant guilty you must be satisfied that he was acting knowingly and intentionally.

Let me explain what those terms mean under the law.

A person acts knowingly if he acts purposely and voluntarily and not because of a mistake or accident or some other innocent reason. A person acts intentionally if he acts willfully with the specific intent to do something the law forbids.

Now the person need not be aware of the specific law or rule that his conduct may be violating, but he must act with a specific intent do whatever it is the law forbids.

These issues of knowledge and intent require you to make a determination about a defendant's state of mind, something that can rarely be proved directly. A wise and careful consideration of all the circumstances, including the

defendant's actions and omissions, may permit you to make a determination as to a defendant's state of mind. Indeed, in your everyday affairs, you are frequently called upon to determine a person's state of mind from his words and actions and unique circumstances. You are asked to do the same thing here.

Now, I also charged you regarding intent in connection with the specific crimes charged in 7, 9, and 11. Those are the offenses charging the taking of a motor vehicle by force, violence, or intimidation.

Just to give you a little bit context, I instructed that there were four elements that must be proved by the government beyond a reasonable doubt before you may find the defendant guilty of any of those crimes.

Those elements are as follows.

First, that the defendant knowingly and willfully took or attempted to take a motor vehicle.

Second, that the defendant, at the time of the taking, intended to cause death or serious bodily harm.

Third, that the taking of the motor vehicle was accomplished by force and violence or by intimidation.

And lastly, that the motor vehicle taken was transported, shipped, or received in interstate commerce.

Now, it strikes us responsive to your note regarding intent are the instructions regarding the second element,

element of intent. I will reread those to you now.

The second element the government must prove beyond a reasonable doubt is that the taking of a motor vehicle was committed with the intent to cause death or serious bodily harm. This requires you to make a determination about the defendant's state of mind at the time of the conduct in question.

I've already discussed with you the fact that a person's intent can rarely be proved by direct evidence. You should consider the totality of the circumstances presented by the evidence before you. The defendant's intent in committing the crime must have been to cause death or serious bodily harm. I remind you that intentional conduct is done wilfully with the purpose to do something the law forbids. In this case, to cause death or serious bodily harm to the person from whom the car was taken.

It is the defendant's theory in the case that the evidence fails to prove that he acted with indent to cause death or serious bodily harm. If the government has failed to prove beyond a reasonable doubt that the defendant acted with the intent to kill or cause serious bodily harm to the particular victim, you must find him not guilty of that offense.

The defendant is entitled to the presumption of innocence with regard to all elements of the offense,

including this element of intent. That is, you must presume that the defendant did not possess the intent to kill or cause serious bodily harm and you must continue to give the benefit of that presumption to the defendant unless and until it is proven beyond a reasonable doubt that the defendant intended to cause death or serious bodily harm at the time of the offense you are considering.

Evidence that the defendant intended to use a gun to frighten the victims is not sufficient in and of itself to prove an intent to kill or cause serious bodily harm. It is, however, one of the facts you may consider in determining whether the government has met its burden. You may also consider the fact that no victim was actually killed or seriously injured when you consider the evidence or the lack of evidence on the defendant's intent.

In some cases, intent is conditional. That is, a defendant may intend to engage in certain conduct only if a certain event occurs.

In this case, the government contends that the defendant intended to cause death or serious bodily harm if the alleged victims had refused to turn over their cars. If you find beyond a reasonable doubt that the defendant had such an intent, the government has satisfied this element of the offense. If you find that the co-defendant, Vernon Lennon, acted with the intent to cause death or serious body injury

that is not sufficient. You must find that the defendant shared in that intent before you can conclude that this element has been satisfied.

I remind you must consider each count separately.

Serious bodily harm is defined to be bodily injury which involves substantial risk of death, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of a bodily member, organ, or mental faculty. This is to be distinguished from mere bodily harm, which means, cut, abrasion, bruise, burn, disfigurement or physical pain or any other injury to the body no matter how temporary. Proof of intent to cause bodily harm is insufficient.

Those are my instructions to you regarding intent. Hopefully, that answers your question.

Let me ask you to return to the jury room and resume your deliberations.

THE CLERK: All rise.

(10:45 a.m. - Jury deliberations resume.)

THE COURT: Please be seated.

(Court in recess awaiting the verdict of the jury.)

(4)

No. 97-7164

In The

Supreme Court of the United States

October Term, 1997

FRANCOIS HOLLOWAY, also known as ABDU ALI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

JOINT APPENDIX

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Petition For Certiorari Filed December 12, 1997
Certiorari Granted April 27, 1998

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Relevant Docket Entries[1]

FRANCOIS HOLLOWAY, also known as
ABDU ALI v. UNITED STATES
NO. 97-7164

Date	Proceedings
	United States District Court for the Eastern District of New York Case No. 95-CR-7804
2/2/95	Indictment returned.
2/13/95	Arraignment. Not guilty plea entered.
12/11/95	Jury sworn. Opening statements presented.
12/12/95	Evidence commences.
12/13/95	Government rests. Defendant's motion for acquittal on car-jacking counts denied. Defendant rests without introducing evidence. Summations held. Jury charged on conditional intent. Deliberations begin. Jury requests recharge on intent.
12/14/95	Supplemental instructions on intent provided to jury. Jury returns a verdict of guilty on all counts.
4/5/96	District Court denying defendant's motion to set aside verdict based upon intent instructions provided to jury.
8/16/96	Sentencing hearing held. Defendant's motion for a new trial denied. Sentence imposed.

[1] Entries edited for clarity and completeness.

8/28/96	Judgment entered. Defendant files Notice of Appeal.
	United States Court of Appeals for the Second Circuit Case No. 96-1563
6/25/97	Oral argument.
9/16/97	Opinion entered affirming judgment of the District court.
	United States Supreme Court No. 97-7164
12/12/97	Francois Holloway's Petition for Certiorari filed.
3/16/98	Government's opposition to Holloway's Petition filed.
4/27/98	Petition for Certiorari granted.

LC:DLG:scw
F. # 9405375
LENNON2.IND

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA

– against –

TEDDY ARNOLD, CHARLES ROBINSON, DAREL JONES, FRANCOIS HOLLOWAY, a/k/a "Abdu Ali", DAVID VALENTINE, PAUL SCAGLIONE and JEFFREY DRAKE,

Defendants.

----------X

INDICTMENT

Cr. No. _____
(T. 18, U.S.C. §§ 371, 511, 2119, 2321, 2322, 924(c), 2 and 3551 *et seq.*)

THE GRAND JURY CHARGES:

INTRODUCTION TO ALL COUNTS

At all times relevant to this Indictment:

1. A house, backyard and driveway, owned by defendant CHARLES ROBINSON, located at 150-59 115th Drive, Jamaica, New York, was used for the purpose of dismantling carjacked and stolen cars. This location was operated as a Chop Shop, that is, a location where persons, including the defendants TEDDY ARNOLD and CHARLES ROBINSON, received and disassembled stolen motor vehicles in order to alter, deface, destroy, disguise, falsify, obliterate and remove the identity, including the

vehicle identification number, of such vehicles and vehicle parts, and to distribute, sell and dispose of the parts in interstate commerce. This property will be referred to hereinafter as "the Robinson Chop Shop".

2. East Coast Auto Collision was located in a warehouse and an adjoining uncovered, fenced yard located at 95-45 and 95-50 Tuckerton Street in Jamaica, New York.

3. Drake's Auto Collision was a warehouse and an adjoining lot located at 216-20 Hempstead Avenue, Jamaica, New York.

4. Both East Coast Auto Collision and Drake's Auto Collision received motor vehicle parts from stolen motor vehicles disassembled at the Robinson Chop Shop.

COUNT ONE

5. Paragraphs 1 through 4 of this Indictment are hereby repeated and realleged and incorporated as if fully set forth herein.

6. On or about and between October 6, 1994 and November 15, 1994, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants TEDDY ARNOLD, CHARLES ROBINSON, DAREL JONES, FRANCOIS HOLLOWAY, a/k/a "Abdu Ali", DAVID VALENTINE and others did knowingly and wilfully conspire to operate, maintain and control a chop shop, to wit, the Robinson Chop Shop, in violation of Title 18, United States Code, Section 2322.

7. In furtherance of said conspiracy, and for the purpose of effecting the objectives thereof, within the

Eastern District of New York, the defendants committed, among others, the following: -

OVERT ACTS

a. On or about October 10, 1994, the defendant TEDDY ARNOLD instructed the defendant DAVID VALENTINE and others to steal a 1993 Mercury Marquis.

b. On or about October 10, 1994, a 1993 Mercury Marquis was carjacked by the defendant DAVID VALENTINE and others.

c. On or about October 10, 1994, the 1993 Mercury Marquis was delivered to the defendant TEDDY ARNOLD at the Robinson Chop Shop.

d. On or about October 10, 1994, the Mercury Marquis was dismantled at the Robinson Chop Shop.

e. On or about October 14, 1994, the defendant TEDDY ARNOLD instructed the defendant FRANCOIS HOLLOWAY, a/k/a "Abdu Ali", and others to steal a 1990 Nissan Maxima.

f. On or about October 14, 1994, a 1990 Nissan Maxima was carjacked by the defendant FRANCOIS HOLLOWAY, a/k/a "Abdu Ali", and others.

g. On or about October 14, 1994, the 1990 Nissan Maxima was delivered to defendant TEDDY ARNOLD at the Robinson Chop Shop.

h. The Nissan Maxima was dismantled by the defendants TEDDY ARNOLD and DAREL JONES at the Robinson Chop Shop.

(Title 18, United States Code, Sections 371 and 3551 *et seq.*).

COUNT TWO

8. On or about and between October 6, 1994 and November 15, 1994, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants TEDDY ARNOLD, CHARLES ROBINSON, DAREL JONES, FRANCOIS HOLLOWAY, a/k/a "Abdu Ali", DAVID VALENTINE and others did knowingly and wilfully own, operate, maintain, and control a chop shop and conduct operations in a chop shop, to wit, the Robinson Chop Shop.

(Title 18, United States Code, Sections 2322, 2 and 3551 *et seq.*).

COUNT THREE

9. On or about October 10, 1994, in the Eastern District of New York, the defendant DAVID VALENTINE and others, with the intent to cause death or serious bodily harm, did knowingly and wilfully take a motor vehicle, to wit: a 1993 Mercury Marquis, that had been transported, shipped and received in interstate commerce from the person and presence of another, by force and violence and by intimidation.

(Title 18, United States Code, Sections 2119, 2 and 3351 *et seq.*).

COUNT FOUR

10. On or about October 10, 1994, in the Eastern District of New York, the defendant DAVID VALENTINE and others did knowingly, wilfully and unlawfully use and carry a firearm during and in relation to a crime of violence, to wit: the offense charged in Count Three above.

(Title 18, United States Code, Sections 924(c)(1), 2 and 3551 *et seq.*).

COUNT FIVE

11. On or about October 12, 1994, in the Eastern District of New York, the defendant DAVID VALENTINE and others, with the intent to cause death or serious bodily harm, did knowingly and wilfully take a motor vehicle, to wit: a 1987 Nissan Maxima, that had been transported, shipped and received in interstate commerce from the person and presence of another, by force and violence and by intimidation.

(Title 18, United States Code, Sections 2119, 2 and 3551 *et seq.*).

COUNT SIX

12. On or about October 12, 1994, in the Eastern District of New York, the defendant DAVID VALENTINE and others did knowingly, wilfully and unlawfully use and carry a firearm during and in relation to a crime of violence, to wit: the offense charged in Count Five above.

(Title 18, United States Code, Sections 924(c)(1), 2 and 3551 *et seq.*).

COUNT SEVEN

13. On or about October 14, 1994, in the Eastern District of New York, the defendant FRANCOIS HOLLOWAY, a/k/a "Abdu Ali", and others, with the intent to cause death or serious bodily harm, did knowingly and wilfully take a motor vehicle, to wit: a 1990 Nissan Maxima, that had been transported, shipped and received in interstate commerce from the person and presence of another, by force and violence and by intimidation.

(Title 18, United States Code Sections 2119, 2 and 3551 *et seq.*).

COUNT EIGHT

14. On or about October 14, 1994 in the Eastern District of New York the defendant FRANCOIS HOLLOWAY, a/k/a "Abdu Ali", and others did knowingly, wilfully and unlawfully use and carry a firearm during and in relation to a crime of violence, to wit: the offense charged in Count Seven above.

(Title 18, United States Code, Sections 924(c)(1), 2 and 3551 *et seq.*).

COUNT NINE

15. On or about October 15, 1994, in the Eastern District of New York, the defendant FRANCOIS HOLLOWAY, a/k/a "Abdu Ali", and others, with the intent to

cause death or serious bodily harm, did knowingly and wilfully take a motor vehicle, to wit: a 1988 Mercedes-Benz 560, that had been transported, shipped and received in interstate commerce from the person and presence of another, by force and violence and by intimidation.

(Title 18, United States Code, Sections 2119, 2 and 3551 *et seq.*).

COUNT TEN

16. On or about October 15, 1994, in the Eastern District of New York, the defendant FRANCOIS HOLLOWAY, a/k/a "Abdu Ali", and others did knowingly, wilfully and unlawfully use and carry a firearm during and in relation to a crime of violence, to wit: the offense charged in Count Nine above.

(Title 18, United States Code, Sections 924(c)(1), 2 and 3551 *et seq.*).

COUNT ELEVEN

17. On or about October 15, 1994, in the Eastern District of New York, the defendant FRANCOIS HOLLOWAY, a/k/a "Abdu Ali", and others, with the intent to cause death or serious bodily harm, did knowingly and wilfully take a motor vehicle, to wit: a 1991 Toyota Celica, that had been transported, shipped and received in interstate commerce from the person and presence of another, by force and violence and by intimidation.

(Title 18, United States Code, Sections 2119, 2 and 3551 *et seq.*).

COUNT TWELVE

18. On or about October 15, 1994, in the Eastern District of New York, the defendant FRANCOIS HOLLOWAY, a/k/a "Abdu Ali", and others did knowingly, wilfully and unlawfully use and carry a firearm during and in relation to a crime of violence, to wit: the offense charged in Count Eleven above.

(Title 18, United States Code, Sections 924(c)(1), 2 and 3551 *et seq.*).

COUNT THIRTEEN

19. On or about October 19, 1994, in the Eastern District of New York, the defendant DAVID VALENTINE, and others, with the intent to cause death or serious bodily harm, did knowingly and wilfully take a motor vehicle, to wit: a 1994 Nissan Sentra, that had been transported, shipped and received in interstate commerce from the person and presence of another, by force and violence and by intimidation.

(Title 18, United States Code, Sections 2119, 2 and 3551 *et seq.*).

COUNT FOURTEEN

20. On or about October 19, 1994, in the Eastern District of New York, the defendant DAVID VALENTINE, and others did knowingly, wilfully and unlawfully use and carry a firearm during and in relation to a crime of violence, to wit: the offense charged in Count Thirteen above.

(Title 18, United States Code, Sections 924(c)(1), 2 and 3551 *et seq.*).

COUNT FIFTEEN

21. On or about October 19, 1994, in the Eastern District of New York, the defendant DAVID VALENTINE, and others, with the intent to cause death or serious bodily harm, did knowingly and wilfully take a motor vehicle, to wit: a 1989 Toyota Corolla, that had been transported, shipped and received in interstate commerce from the person and presence of another, by force and violence and by intimidation.

(Title 18, United States Code, Sections 2119, 2 and 3551 *et seq.*).

COUNT SIXTEEN

22. On or about October 19, 1994, in the Eastern District of New York, the defendant DAVID VALENTINE, and others did knowingly, wilfully and unlawfully use and carry a firearm during and in relation to a crime of violence, to wit: the offense charged in Count Fifteen above.

(Title 18, United States Code, Sections 924(c)(1), 2 and 3551 *et seq.*).

COUNT SEVENTEEN

23. On or about October 21, 1994, in the Eastern District of New York, the defendant DAVID VALENTINE, and others, with the intent to cause death or serious

bodily harm, did knowingly and wilfully take a motor vehicle, to wit: a 1993 Toyota Camry, that had been transported, shipped and received in interstate commerce from the person and presence of another, by force and violence and by intimidation.

(Title 18, United States Code, Sections 2119, 2 and 3551 *et seq.*).

COUNT EIGHTEEN

24. On or about October 21, 1994, in the Eastern District of New York, the defendant DAVID VALENTINE did knowingly, wilfully and unlawfully use and carry a firearm during and in relation to a crime of violence, to wit: the offense charged in Count Seventeen above.

(Title 18, United States Code, Sections 924(c)(1), 2 and 3551 *et seq.*).

COUNT NINETEEN

25. Paragraphs 1 through 4 of this Indictment are hereby repeated and realleged and incorporated by reference as if fully set forth below.

26. On or about and between October 6, 1994 and November 15, 1994, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants TEDDY ARNOLD, CHARLES ROBINSON, DAREL JONES, PAUL SCAGLIONE, JEFFREY DRAKE and others did knowingly and wilfully conspire to:

A. Remove, obliterate, tamper with and alter identification numbers for motor vehicles and motor vehicle parts, in violation of Title 18 United States Code, Section 511; and

B. Buy, receive, possess, and obtain control of, with intent to sell and otherwise dispose of, motor vehicles and motor vehicle parts, knowing that identification numbers for such motor vehicles and parts had been removed, obliterated, tampered with, and altered, in violation of Title 18, United States Code, Section 2321.

27. In furtherance of said conspiracy, and for the purpose of effecting the objectives thereof, within the Eastern District of New York, the defendants committed, among others, the following:

OVERT ACTS

a. On or about and between October 10, 1994 and October 23, 1994, both dates being approximate and inclusive, the defendant TEDDY ARNOLD delivered a quantity of motor vehicle parts to East Coast Auto Collision. The vehicle identification numbers had been removed from the motor vehicle parts.

b. On or about October 19, 1994, a 1989 Toyota Corolla was carjacked by others at the direction of the defendant DAREL JONES.

c. On or about October 19, 1994, the 1989 Toyota Corolla was delivered to the Robinson Chop Shop.

d. On or about October 19, 1994, the Toyota Corolla was disassembled and its vehicle identification numbers

were removed by the defendant DAREL JONES at the Robinson Chop Shop.

e. On or about October 19, 1994, the defendant DAREL JONES delivered parts from the 1989 Toyota Corolla to Drake's Auto Collision.

f. On or about and between October 25, 1994 and November 11, 1994, the defendants TEDDY ARNOLD and DAREL JONES disassembled motor vehicles at the Robinson Chop Shop.

g. On or about and between October 25, 1994 and November 11, 1994, the defendant DAREL JONES and others delivered a quantity of motor vehicle parts to Drake Auto Collision. The vehicle identification numbers had been removed from the motor vehicle parts delivered to Drake Auto Collision.

h. On or about November 8, 1994, the defendant TEDDY ARNOLD delivered a quantity of motor vehicle parts to East Coast Auto Collision. The vehicle identification numbers of the vehicle parts delivered to East Coast Auto Collision had been removed, obliterated, altered and otherwise tampered with.

(Title 18, United States Code, Sections 371 and 3551 *et seq.*).

COUNT TWENTY

28. On or about and between October 6, 1994 and November 15, 1994, within the Eastern District of New York, the defendants TEDDY ARNOLD, CHARLES ROBINSON, DAREL JONES, JEFFREY DRAKE and others did

knowingly and wilfully receive, possess and obtain control of, with intent to sell and otherwise dispose of, motor vehicle parts, to wit: front and rear bumpers, knowing that the identification numbers for said items had been removed.

(Title 18, United States Code, Sections 2321, 2 and 3551 *et seq.*).

COUNT TWENTY-ONE

29. On or about and between October 6, 1994 and November 15, 1994, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants TEDDY ARNOLD, CHARLES ROBINSON, DAREL JONES, JEFFREY DRAKE and others did knowingly remove, obliterate, tamper and alter the identification numbers of motor vehicle parts.

(Title 18, United States Code, Sections 511, 2 and 3551 *et seq.*).

COUNT TWENTY-TWO

30. On or about and between October 6, 1994 and November 15, 1994, within the Eastern District of New York, the defendants TEDDY ARNOLD, CHARLES ROBINSON, DAREL JONES, PAUL SCAGLIONE and others did knowingly and wilfully receive, possess of, motor vehicle parts, knowing that the identification numbers for said items had been removed.

(Title 18, United States Code, Sections 2321, 2 and 3551 *et seq.*).

COUNT TWENTY-THREE

31. On or about and between October 6, 1994 and November 15, 1994, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants TEDDY ARNOLD, CHARLES ROBINSON, DAREL JONES, PAUL SCAGLIONE and others did knowingly remove, obliterate, tamper and alter the identification numbers of motor vehicle parts.

(Title 18, United States Code, Sections 511, 2 and 3551 *et seq.*).

A TRUE BILL

_____

FOREPERSON

_____

ZACHARY W. CARTER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

BY: /s/ Illegible
ACTING UNITED STATES ATTORNEY
PURSUANT Illegible

_____

Jury Instructions
(Excerpted from Trial Transcript – Beginning at Pg. 333)

[Tr. 333] Now Counts 7, 9, and 11 all charge the defendant with violations of the Section 2119 of Title 18. Specifically, they read as follows:

Count 7 states:

On or about October 14th, 1994, in the Eastern District of New York, the defendant Francois Holloway, also known as Abdu Ali and others, with the intent to cause death or serious bodily harm, did knowingly and willfully take a motor vehicle, to wit: A 1990 Nissan Maxima, that had been transported, shipped and received in interstate commerce from the person and presence of another, by force and violence and by intimidation.

Although these are separate charges, they must be considered separately by you. The law with regard to each is the same. They each charge a violation of Section 2119 which provides as follows:

Whoever with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce, from the person or [Tr. 334] presence of another by force and violence or by intimidation or attempts to do so, shall be guilty of a crime under the laws of the United States.

To establish this crime, the government must prove each of the following elements beyond a reasonable doubt.

First, that the defendant knowingly and willfully took or attempted to take a motor vehicle.

Second – I didn't read Counts 9 and 11.

These elements all relate to all three crimes that are charged in Counts 7, 9, and 11. Let me complete the reading of those counts.

Count 9 is: On or about October 15, 1994, in the Eastern District of New York, the defendant Francois Holloway, also known as Abdu Ali, and others, with the intent to cause death or serious bodily harm, did knowingly and willfully take a motor vehicle, to wit: A 1988 Mercedes-Benz 560, that had been transported, shipped and received in interstate commerce from the person and presence of another, by force and violence and by intimidation.

Count 11 reads: On or about October 15, 1994, in the Eastern District of New York, the defendant Francois Holloway also known as Abdu Ali and others, with the intent to cause death or serious bodily harm, did knowingly and willfully take a motor vehicle, to wit: A 1991 Toyota Celica, that had been transported, shipped and received in interstate commerce from the [Tr. 335] person and presence of another, by force and violence and by intimidation.

All three of these offenses, Count 7, Count 9, Count 11, call for the government to prove each of the following elements beyond a reasonable doubt.

First, that the defendant knowingly and willfully took or attempted to take a motor vehicle.

Second, that the defendant at the time of the taking, intended to cause death or serious bodily harm.

Third, that the taking of the motor vehicle was accomplished by force and violence or by intimidation.

Fourth, that the motor vehicle taken was transported, shipped or received in interstate commerce.

The first of these elements that the defendant knowingly took or knowingly attempted to take a motor vehicle. As I explained before to do something knowingly is to act purposely and voluntarily and not because of a mistake or accident or other innocent reason.

Now, the defendant need not have been aware of the specific law and rule that his conduct may have violated, but he must act with a specific intent to do whatever it is the law forbids, here take a motor vehicle by force, violence or intimidation.

The second element the government must prove beyond a reasonable doubt is that the taking was committed with the intent [Tr. 336] to cause death or serious bodily harm. This requires you to make a determination about the defendant's state of mind at the time of the conduct in question. I've already discussed with you the fact that a person's intent can rarely be proved by direct evidence. You should consider the totality of the circumstances presented by the evidence before you.

The defendant's intent in committing the crime must have been to cause death or serious bodily harm. I remind you that intentional conduct is done willfully, with a bad purpose to do something the law forbids, in this case, to cause death or serious bodily harm to the person from whom the car was taken.

It is the defendant's theory of the case that the evidence fails to prove that he acted with intent to cause death or serious bodily harm.

If the government has failed to prove beyond a reasonable doubt that the defendant acted with the intent to kill or cause serious bodily harm to the particular victim, you must find him not guilty of that offense.

The defendant is entitled to the presumption of innocence with regard to all of the elements of the offense including this element. That is, you must presume that the defendant did not possess the intent to kill or cause serious bodily harm and you must continue to give the benefit of that presumption to the defendant unless and until it is proven beyond a reasonable doubt that the defendant intended to cause death or [Tr. 337] serious bodily harm at the time of the events you are considering.

Evidence that the defendant intended to use a gun to frighten the victims is not sufficient in and of itself to prove an intent to kill or cause serious bodily harm. It is, however, one of the facts you may consider in determining whether the government has met its burden.

You may also consider the fact that no victim was actually killed or seriously injured when you consider the evidence or lack of evidence as to the defendant's intent.

In some cases, intent is conditional. That is, a defendant may intend to engage in certain conduct only if a certain event occurs.

In this case, the government contains that the defendant intended to cause death or serious body [sic] harm if the alleged victims had refused to turn over their cars. If

you find beyond a reasonable doubt that the defendant had such an intent, the government has satisfied this element of the offense.

If you find that the co-defendant, Vernon Lennon, acted with the intent to cause death or serious bodily injury, that is not sufficient. You must find that the defendant shared in that intent before you can conclude that this element has been satisfied.

Let me also remind you, you must consider each count separately.

[Tr. 338] Serious bodily harm is defined to be "bodily injury" which involves substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of a bodily [sic] member, organ, or mental faculty.

This is to be distinguished from "bodily harm" which means cut, abrasion, bruise, burn, or disfigurement, physical pain or any other injury to the body, no matter how temporary.

Proof of intent to cause bodily harm as opposed to serious bodily harm is insufficient.

The third element the government must prove is that the taking of the motor vehicles were accomplished by force or violence or by intimidation.

The government can meet its burden on this element by proving beyond a reasonable doubt either that the defendant used force or violence or that the defendant acted in an intimidating manner, it need not prove both. The phrase "intimidating manner" means that the defendant said or did something that would make an ordinary

person fear bodily harm or for the purpose of causing another person to fear bodily harm.

However, it is not necessary for the government to prove that the victim was actually frightened in order to establish that the defendant acted in an intimidating manner. Your focus should be on the defendant's behavior. Although the government does not have to show that the defendant's behavior caused or could have caused terror, the government does have to show that [Tr. 339] an ordinary person would have feared bodily harm because of it.

The fourth element requires proof that the motor vehicle unlawfully taken was moved in interstate commerce. The government does not have to prove that the defendant knew that the vehicle had moved in interstate commerce. The government can satisfy this element by showing that the motor vehicle had, at any point, previously traveled across a state line.

* * *

[Tr. 349] (Jury Deliberations commence 4:20 p.m.)

(5:05 p.m.)

THE COURT: Does either side have any objection to my just sending the jury back home. We don't need to bring him back here to excuse them.

MR. HANNA: Right.

MR. GARRETT: No objection.

THE COURT: Tell them to go home. Make sure they go out that way.

THE MARSHAL: Yes.

THE COURT: Let's stay here. I want to put the notes on the record.

No sense keeping them waiting.

[Tr. 350] I have jury note No. 1 and 2.

MR. HANNA: The defendant is not here yet, he is on his way up.

THE MARSHAL: What time you want them back, your Honor?

THE COURT: 9:30.

THE COURT: Jury note No. 2 is: We would like to leave at 5 p.m. and return tomorrow.

Pursuant to that, we've decided, without calling the jury into the courtroom, just to send them home. No one objects to that.

Jury note number 1 asks for: "Need a copy of the law stated by Judge on intent."

What I intend to do tomorrow, but I will hear you both on this, is to mark as a court exhibit my full charge and just give them the charge.

Mr. Garrett you want to be heard on that?

MR. GARRETT: I have no objection to that, your Honor.

MR. HANNA: Judge, I do.

I ask that the Court comply with the strict letter of the request, not go beyond the request, and give the jury

exactly what they ask for and no more, which is a copy of the Court's instructions with regard to the issue of intent.

THE COURT: All right. Why don't you prepare, between now and when we reconvene, copy the parts of the charge that relate to intent. I think they are scattered around.

[Tr. 351] In light of that objection, since all they ask for is the charge on intent, I will give the charge only as it relates to intent.

I am a little surprised at your position since you told them they would be getting the entire charge in the summation, but seeking your own counsel, I am sure I will reiterate to them that they must regard my charge as a whole. I will give them just these pieces but rereiterate [sic] to them they need to keep in mind my charge as a whole.

All right.

MR. HANNA: Yes, your Honor.

THE COURT: We'll see you at 9:15 tomorrow morning, make sure we have agreed to what they'll get.

MR. GARRETT: All right, your Honor.

MR. HANNA: All right.

(5:10 p.m.)

* * *

Supplemental Jury Instructions Regarding Intent

[Tr. 354] (The jury commenced their deliberations at 10:30 a.m.)

THE CLERK: All rise.

THE COURT: Good morning, everybody.

Please be seated.

Good morning. The jurors are all finally here. Apparently the weather kept some of them from getting here on time.

We will bring the jury in and respond to this note that says, "Need a copy of the law stated by Judge on intent."

The way I intend to respond to it, as I mentioned yesterday, is to read to them relevant portions of the charge relating to intent. It strikes me what is responsive to this request is the part of the charge that begins at the bottom of Page 17, "knowing and intentional conduct" generally through the first third of Page 19 ending where we start with Count 1.

I will read to them again from the first full paragraph, beginning with the first full paragraph on Page 31 down through the defense theory of the case all the way through to the end of that paragraph that ends about six lines down on Page 34.

What I intend to do there is to give the jury some context. I will read to them the general instructions regarding intent. Then I will tell them, in connection with Counts 7, 9, and 11 there were four elements the government [Tr. 355] must prove, the second of which is intent to cause death or serious bodily harm. I will give them some context and then I will read that part of the charge.

MR. HANNA: Your Honor, I want to be sure. You had asked me to prepare what I thought was responsive, and I have prepared exactly the same thing that the Court

had focused on except I am not quite sure about where we end on Page 34.

I had included all of Page 34. At the end of that, " . . . you find serious bodily harm . . . ," " . . . bodily harm . . . " and going down to "proof of intent to cause bodily harm is insufficient." I think that is responsive.

THE COURT: Yes. I think you are one draft behind me because I made changes based on the charge conference. I intend to end with the sentence "proof of intent to cause bodily harm is insufficient," after the changes that were made in the charge conference.

MR. HANNA: Okay. The copies that I had made, your Honor, are from the actual final charge. I would ask that the Court respond, as well as reading, but respond to the instruction, or the request, and actually give them a copy of the charge to take into the jury room after you are done charging them.

THE COURT: I will give them the entire charge or I will read them the portions of the charge and encourage them to take the charge as a whole. I am not going to send in, in [Tr. 356] written form, part of the charge.

I understood you to object to sending them the whole charge. That's why I am proceeding the way I intend to do now. I am afraid by sending, in written form, just part of it, I will undercut the bedrock principle that they should view all my instructions as a whole.

MR. HANNA: We would respectfully object to this, request that you send in the charge.

THE COURT: All right. Your request is denied.

Bring in the jury.

THE CLERK: All rise.

(11:30 – jury entered the courtroom).

THE COURT: Please be seated, everyone. Good morning, ladies and gentlemen. Everybody made it in okay eventually.

All right. At the end of the day yesterday, I received from you what's been marked as Jury Note 1: "Need a copy of the law as stated by the Judge on intent."

What I will do now is read to you the portions of the charge I gave you yesterday that relate to intent. There are two segments of the charge that respond to your note.

Let me remind you at the outset that although I intend to do that, let me remind you not to single out any one instruction, these ones included relating to intent, as alone stating the law. Rather, you should consider my instructions [Tr. 357] a whole when you deliberate.

Now I instructed you regarding intent in two respects. First, regarding knowledge, and intent generally as opposed to in the context of the particular counts. Let me reread to you my instructions regarding knowledge and intent generally.

As a general rule, the law holds persons accountable only for conduct they intentionally engage in. Thus, in describing the various crimes that have been charged to you, I have on occasion explained, before you can find the defendant guilty you must be satisfied that he was acting knowingly and intentionally.

Let me explain what those terms mean under the law.

A person acts knowingly if he acts purposely and voluntarily and not because of a mistake or accident or some other innocent reason. A person acts intentionally if he acts willfully with the specific intent to do something the law forbids.

Now the person need not be aware of the specific law or rule that his conduct may be violating, but he must act with a specific intent do whatever it is the law forbids.

These issues of knowledge and intent require you to make a determination about a defendant's state of mind, something that can rarely be proved directly. A wise and careful consideration of all the circumstances, including the [Tr. 358] defendant's actions and omissions, may permit you to make a determination as to a defendant's state of mind. Indeed, in your everyday affairs, you are frequently called upon to determine a person's state of mind from his words and actions and unique circumstances. You are asked to do the same thing here.

Now, I also charged you regarding intent in connection with the specific crimes charged in 7, 9, and 11. Those are the offenses charging the taking of a motor vehicle by force, violence, or intimidation.

Just to give you a little bit context, I instructed that there were four elements that must be proved by the government beyond a reasonable doubt before you may find the defendant guilty of any of those crimes.

Those elements are as follows.

First, that the defendant knowingly and willfully took or attempted to take a motor vehicle.

Second, that the defendant, at the time of the taking, intended to cause death or serious bodily harm.

Third, that the taking of the motor vehicle was accomplished by force and violence or by intimidation.

And lastly, that the motor vehicle taken was transported, shipped, or received in interstate commerce.

Now, it strikes us responsive to your note regarding intent are the instructions regarding the second element, [Tr. 359] element of intent. I will reread those to you now.

The second element the government must prove beyond a reasonable doubt is that the taking of a motor vehicle was committed with the intent to cause death or serious bodily harm. This requires you to make a determination about the defendant's state of mind at the time of the conduct in question.

I've already discussed with you the fact that a person's intent can rarely be proved by direct evidence. You should consider the totality of the circumstances presented by the evidence before you. The defendant's intent in committing the crime must have been to cause death or serious bodily harm. I remind you that intentional conduct is done wilfully with the purpose to do something the law forbids. In this case, to cause death or serious bodily harm to the person from whom the car was taken.

It is the defendant's theory in the case that the evidence fails to prove that he acted with indent [sic] to cause death or serious bodily harm. If the government has failed to prove beyond a reasonable doubt that the defendant acted with the intent to kill or cause serious

bodily harm to the particular victim, you must find him not guilty of that offense.

The defendant is entitled to the presumption of innocence with regard to all elements of the offense, [Tr. 360] including this element of intent. That is, you must presume that the defendant did not possess the intent to kill or cause serious bodily harm and you must continue to give the benefit of that presumption to the defendant unless and until it is proven beyond a reasonable doubt that the defendant intended to cause death or serious bodily harm at the time of the offense you are considering.

Evidence that the defendant intended to use a gun to frighten the victim is not sufficient in and of itself to prove an intent to kill or cause serious bodily harm. It is, however, one of the facts you may consider in determining whether the government has met its burden. You may also consider the fact that no victim was actually killed or seriously injured when you consider the evidence or the lack of evidence on the defendant's intent.

In some cases, intent is conditional. That is, a defendant may intend to engage in certain conduct only if a certain event occurs.

In this case, the government contends that the defendant intended to cause death or serious bodily harm if the alleged victims had refused to turn over their cars. If you find beyond a reasonable doubt that the defendant had such an intent, the government has satisfied this element of the offense. If you find that the co-defendant, Vernon Lennon, acted with the intent to cause death or serious body injury [Tr. 361] that is not sufficient. You

must find that the defendant shared in that intent before you can conclude that this element has been satisfied.

I remind you must consider each count separately.

Serious bodily harm is defined to be bodily injury which involves substantial risk of death, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of a bodily member, organ, or mental faculty. This is to be distinguished from mere bodily harm, which means, cut, abrasion, bruise, burn, disfigurement or physical pain or any other injury to the body no matter how temporary. Proof of intent to cause bodily harm is insufficient.

Those are my instructions to you regarding intent. Hopefully, that answers your question.

Let me ask you to return to the jury room and resume your deliberations.

THE CLERK: All rise.

(10:45 a.m. – July deliberations resume.)

THE COURT: Please be seated.

(Court in recess awaiting the verdict of the jury.)

UNITED STATES OF AMERICA, – against – FRANCOIS HOLLOWAY, also known as "Abdu Ali," Defendant.

95-CR-0078 (JG)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

921 F. Supp. 155; 1996 U.S. Dist. LEXIS 4905

April 5, 1996, Dated

COUNSEL: APPEARANCES:

ZACHARY W. CARTER, United States Attorney, Brooklyn, New York, By: Dolan L. Garrett, Assistant U.S. Attorney.

DANA HANNA, ESQ., Brooklyn, New York, Attorney for Defendant.

JUDGES: JOHN GLEESON, United States District Judge

OPINIONBY [sic]: JOHN GLEESON

OPINION: MEMORANDUM AND ORDER

JOHN GLEESON, United States District Judge:

Defendant Francois Holloway, also known as "Abdu Ali," was indicted on February 2, 1995. He was charged with conspiring to operate a "chop shop," in violation of 18 U.S.C. § 371, operating a chop shop, in violation of 18 U.S.C. § 2322, three counts of carjacking, in violation of 18 U.S.C. § 2119, and three counts of using and carrying a firearm during and in relation to the charged carjackings, in violation of 18 U.S.C. § 924(c). A jury trial was held in December 1995, after which Ali was found guilty of all charges.

Ali now moves for a new trial pursuant to Fed. R. Civ. P. 33, claiming that such relief is required in the

interest of justice. In the alternative, he seeks reconsideration of his unsuccessful motion pursuant to Fed. R. Cr. P. 29, which he made at trial. The issue raised by the motion was also the central issue at the trial: what must the government prove to satisfy the intent element of the carjacking statute, 18 U.S.C. § 2119?[1]

There is no question that the conduct at issue in this case is precisely what Congress and the general public would describe as carjacking, and that Congress intended to prohibit it in § 2119. However, carelessness in the legislative process has produced a criminal statute that says something fundamentally different than what Congress obviously meant to say. As a result, Ali advances a colorable claim that his conduct here – using a gun to terrorize motorists into giving up their cars – is no longer prohibited by the carjacking statute. Indeed, it is likely that a 1994 amendment to the statute, which was explicitly intended to broaden the available penalties, in fact placed a large number of "carjackers" beyond its reach.

Ali, however, is not among them. Though colorable, his argument fails for the reasons set forth below, and his motion is denied.

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[1] Although Ali's motion purports to address all of the charges against him, none of his arguments addresses Counts One or Two (conspiracy to operate a chop shop and operation of a chop shop, respectively). Even if the challenges raised on this motion had merit, there would be no reason to set aside the jury's verdicts on those counts.

A. The Facts

Vernon Lennon's father, Teddy Arnold, operated a "chop shop" in Queens, New York. Lennon stole cars for his father to chop. His father would tell him what year and model cars he needed, and Lennon would locate such cars and steal them. He did not know how to disable alarms or "hot wire" cars, so Lennon's modus operandi was to take the cars from their owners at gunpoint. Lennon was a team player, always taking another robber with him to help locate the target car and steal it. Since Lennon liked to follow a targeted car, often to the driver's home, before committing the robbery, a teammate was a virtual necessity; if the robbery was successful, there were two cars that had to be driven away.

Lennon has known the defendant Ali (whom Lennon knows as Francois Holloway) since they were boys. In approximately September 1994, he recruited Ali, who would hang around the chop shop, to steal cars with him. Lennon told Ali that Lennon would use a gun to steal the cars, and showed him the gun, a .32 caliber revolver. Ali agreed to help for a fixed fee per car stolen.

On October 14, 1994, Lennon and Ali stole a 1992 Nissan Maxima. They followed the car to the home of its driver, 69 year-old Stanley Metzger, in Queens. As Metzger got out of his car, Lennon and Ali got out of theirs. Lennon approached Metzger, pointed the gun at him, and demanded the keys. Metzger was apparently not fast enough in complying, so Lennon threatened to shoot him. Metzger handed over the keys, and was then told to hand over his wallet. He did so, and the robbers drove off with his car and his money.

On the next day, October 15, 1994, at approximately 8:00 p.m., Lennon and Ali spotted Donna DiFranco driving a 1991 Toyota Celica at the Whitestone Shopping Center in Queens. They followed her to her friend's house, and Lennon approached her after she exited her parked car. He pointed a gun at her and demanded her money and her car keys. She complied, and after some fumbling with the car alarm and an anti-theft device, Lennon and Ali took her car.

At approximately 10:00 p.m. on the same day, Lennon and Ali stole another car, a 1988 Mercedes Benz. They followed the victim, Ruben Rodriguez, to his home in the Jamaica Estates section of Queens. Both robbers got out of their car and approached Rodriguez, who had just stepped out of the Mercedes Benz. Lennon asked Rodriguez if he knew the location of a particular address. The address was, as Rodriguez put it, "way off base," and he knew "something was up." Rodriguez got back into his car and closed the door. Lennon pulled the gun and told him to get out of the car or he would be shot. Rodriguez got out of his car, and Lennon demanded his money as well as the keys. Rodriguez hesitated; his money was in a clutch bag on the passenger's seat, and he felt he might be killed if he leaned into the car to get it. Frustrated by the delay, the defendant Ali punched Rodriguez in the face. Rodriguez reeled backwards from the punch and used that momentum to begin running away from the robbers, who fled with his car and his money.

On all three occasions,[2] Lennon and Ali intended to leave the victims unharmed. Lennon never fired the gun in any of the carjackings. An experienced criminal, he knew that if he did, he risked a lengthier prison term than he would receive for simply robbing the car. For each robbery, the plan was to use the firearm only to obtain possession of the car, not to shoot or otherwise harm the victim.

However, in all three of the charged carjackings, Lennon was prepared to shoot the victims if their resistance made that necessary. In other words, he intended to kill or seriously injure the victims, but that intent was conditioned on their giving the robbers "a hard time." There was ample evidence from which a rational juror could infer that the defendant Ali shared that conditional intent.

B. The Carjacking Statute And Its 1994 Amendment

In September 1992, Paula Basu, a Maryland woman, had her car stolen from her by two men. The men forced her from her car and drove off. Because her infant daughter was in the car, Basu clung to it as the men drove away, and was dragged to her death.

This horrific offense generated a public outcry, and focused attention on legislative efforts to make car robberies a federal crime. Those efforts resulted in the Anti

[2] There was also evidence of two uncharged crimes committed by Ali with Lennon: one other successful carjacking and an attempted one that was aborted by the arrival of a police officer on the scene.

Car Theft Act of 1992, codified at 18 U.S.C. § 2119. As initially enacted, this new federal offense read as follows:

> Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall –
>
> (1) be fined under this title or imprisoned not more than 15 years, or both,
>
> (2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and
>
> (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.

The subsections of the statute obviously related solely to punishment, and were not elements of the offense. They provided for enhanced penalties of up to 25 years if serious bodily injury resulted from the offense, and up to life in prison if it resulted in death.

During 1993, Congress was considering extensive new criminal legislation, which included an array of new death penalties. Members of both houses proposed amendments to the newly-minted carjacking statute. The Senate bill proposed an amendment that would provide for the death penalty in cases where a carjacking results in death. S. 942, 103d Cong., 1st Sess. (1993). Senator Lieberman proposed a further amendment to this death penalty provision that would eliminate the requirement that such cases involve the use a firearm by the carjacker.

In his remarks in support of his proposed amendment, Senator Lieberman observed:

> If a carjacking occurs and a death occurs as a result of that, does it really matter whether a firearm was used, whether a knife was used, whether physical force was used, or whether a mother, as in the Basu case, was dragged to her death because she wanted to make every effort to save the life of her child?
>
> . . .
>
> In this case, the very bill I am amending has the death penalty for carjacking. All I am doing here is taking a small but I think significant additional step in saying, if the death penalty is going to be enacted into law for cases of carjacking where death occurs, then we ought not to require that that death has to involve a firearm. If the person in a carjacking is killed as a result of a knife or other weapon or just as a result of the carjacking, then the criminal ought to be subject to death himself. That is why I propose the amendment.

139 Cong. Rec. S15295, S15301, S15303 (1993) (statement of Sen. Lieberman).

Thus, with respect to carjackings resulting in death, the Senate bill eliminated the firearm requirement and provided for the death penalty. Because such a statute could authorize the death penalty for an accomplice who neither killed a victim nor intended to kill or harm the victim, it would have been subject to attack under the Eighth Amendment. See Enmund v. Florida, 458 U.S. 782, 73 L. Ed. 2d 1140, 102 S. Ct. 3368 (1982). Perhaps for that reason, the conference report for the bill modified the

Senate death penalty amendment for carjacking by adding an intent requirement – the "intent to cause death or serious bodily harm." H.R. Rep. No. 103-694, 103d Cong., 2d Sess. (1994).

These combined efforts resulted in the following provision of the Violent Crime Control and Law Enforcement Act of 1994:

> (14) CARJACKING – Section 2119(3) of title 18, United States Code, is amended by striking the period after "both" and inserting ", or sentenced to death."; and by striking ", possessing a firearm as defined in section 921 of this title," and inserting ", with the intent to cause death or serious bodily harm."

Violent Crime Control and Law Enforcement Act of 1994 (the "Act"), Pub L. No. 103-322, Title VI, § 60003(a)(14), 108 Stat. 1796, 1970 (1994). The provision was intended to affect only carjackings resulting in death. That was the sole focus of the legislative debates. Moreover, the provision was included in Title VI of the Act, which was entitled the "Federal Death Penalty Act of 1994." The most powerful evidence of the limited purpose of the amendment is Congress' obvious belief that it was amending only a penalty enhancement provision, not the statutory prohibition itself. Specifically, it purported to amend "§ 2119(3)," the subsection of the original (and existing) statute that is solely a penalty provision. Indeed, it is the penalty provision applicable to cases in which death results, which cases were, as noted, the only focus of the legislature's attention.

However, the possession-of-a-firearm requirement that the amendment eliminated was not, as the amendment mistakenly assumed, located in 2119(3). In fact, it was not in any of the three penalty provisions; rather, it was an element of the offense itself, a necessary ingredient of all carjacking prosecutions, not just those resulting in death. Thus, in its effort to eliminate the firearm requirement only in cases resulting in death, Congress enacted an amendment that, on its face, eliminates it in all cases.[3]

Similarly, Congress intended to add a new intent element for cases in which the death penalty is sought. However, notwithstanding the amendment's stated intention to affect only the penalty provisions of § 2119(3), it added the new element – "the intent to cause death or serious bodily harm" – to the first clause of § 2119, and thus made it applicable to all violations of the statute.

As amended, the statute now reads as follows:

Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce

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[3] It has been suggested that, notwithstanding the unequivocal language of the amended statute, the firearm requirement has only been eliminated when the carjacking results in death, and still must be proved in cases, like this one, that fall within § 2119(a) or (b). M. Michenfelder, The Federal Carjacking Statute: To Be Or Not To Be? An Analysis Of The Propriety Of 18 U.S.C. § 2119, 39 St. Louis U.L.J. 1009 (1995). Perhaps because a firearm was used in this case, however, that strained argument has not been made here, and thus its merits need not be addressed.

from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall –

(1) be fined under this title or imprisoned not more than 15 years, or both,

(2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and

(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death.

In short, the 1994 amendment to the carjacking statute effected fundamental changes that Congress never intended. The elimination of the firearm requirement for all cases federalized approximately 14,000 additional cases each year.[4] At the same time that it inadvertently opened the door for all these cases, Congress inadvertently closed it substantially by unintentionally imposing the specific intent requirement on the entire statute, not just in death penalty cases.[5]

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[4] See Michenfelder, supra note 3, at 1012-13 (35,000 carjackings or attempted carjackings were committed during each of the years 1987-92, and firearms were used 50% of the time).

[5] The government does not contend, as it might have, that the specific intent required by the 1994 amendment is an element only in carjacking cases where death results and the death penalty is sought. For that reason and because I conclude Ali had the specific intent required by the statute in any event, I do not need to address that issue.

C. Discussion

Ali urges a literal construction of the amended statute, contending that it prohibits only those carjackings in which the perpetrators unconditionally intend to kill or seriously injure their victims. Under this reading, the law would not prohibit the crimes committed by Ali and Lennon, where the intent of the carjackers was not to kill or injure people, but to get cars. Indeed, this reading would no doubt insulate from federal prosecution the large majority of carjackings, as carjackers generally do not intend to cause death or serious bodily injury, but in fact hope that the opposite will occur, i.e., that the victim will peaceably give up the car and suffer no harm at all.

Thus, if accepted, Ali's construction of the carjacking statute would drastically narrow its scope. Only those carjackers who intend not only to rob cars, but also to murder or seriously injure another, could be prosecuted. A person who intends to find a Mercedes Benz, shoot the owner and take the car could be prosecuted. A person who intends to find a Mercedes Benz and shoot the owner only if she refuses to give up her car could not, at least if the plan succeeds and the car is taken without the need to fire.

This would be an odd result. The statute would no longer prohibit the very crime it was enacted to address except in those unusual circumstances when carjackers also intended to commit another crime – murder or a serious assault. Moreover, this result, if accepted, would be the ironic product of legislation that was intended "to broaden and strengthen [the carjacking statute] so our U.S. attorneys (sic) have every possible tool available to

them to attack the problem." 139 Cong. Rec. S15295, S15301 (1993) (statement of Sen. Lieberman).

Ali's argument fails because his intent to aid and abet Lennon's use of the firearm if the victims resisted is sufficient. Where a crime is defined to require a particular intention, that element is satisfied even if the requisite intent is conditional, unless the condition negatives the evil sought to be prevented by the statute. W. R. Lafave and A. W. Scott, Jr., Handbook on Criminal Law, § 28 at 200 (1972):

Although the issue of conditional intent is not raised very often, at least in the federal courts, it is not new. In People v. Connors, 253 Ill. 266, 97 N.E. 643 (Ill. 1912), the defendants held guns to members of a rival labor union and told them to take off their overalls or they would be shot. Although the workers complied, and there was no shooting, the defendants were convicted of assault with an intent to murder. 253 Ill. at 273. In upholding the conviction, the Supreme Court of Illinois held that the crime is "complete where it is shown that the assailant, with the present ability to destroy life or do great bodily harm, draws a dangerous weapon on another and threatens to kill him unless the party assailed complies immediately with some unlawful condition or demand. . . . The offense is complete even though commission of the felony is averted by the submission of the assailed party to the unlawful demands made upon him." Id. at 647-48.

Some conditions on intent may bring the conduct out of the reach of the statute. In Hairston v. Mississippi, 54

Miss. 689 (1877), Hairston attempted to remove the personal effects of a laborer from a plantation. When the plantation owner grabbed Hairston's mules to prevent him from removing the property, Hairston pointed a pistol at him and angrily threatened to " 'shoot any G-d d – d man who attempts to stop my mules.' " Id. at 692. The plantation owner released the mules, and Hairston was convicted of assaulting him with intent to murder. The Supreme Court of Mississippi reversed the conviction. Because the plantation owner was trespassing on Hairston's property by grabbing his mules, the threat to shoot was conditioned on a demand Hairston had a right to make, and thus he could not be guilty of the offense.

Here, of course, there can be no doubt that the intent to shoot the victims was conditioned on a demand – that they turn over their cars – that Lennon and Ali had no right to make.

Not all instances of conditional intent involve demands by the defendant. A person may break into a house intending to rape its occupant if she is home, or to steal from it only if no one is home. Section 2.02(6) of the Model Penal Code provides as follows:

Requirement of Purpose Satisfied if Purpose Is Conditional. When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense.

See also United States v. Arrellano, 812 F.2d 1209, 1212 n.2 (9th Cir. 1987).

Viewed under this standard, the conditional nature of Ali's intent obviously does not help him. The evil sought to be prevented by § 2119 is not "negatived" by the condition, it is the condition. Section 2119 is not a murder or assault statute, it is a car robbery statute.

Ali's argument on this motion relies in part on the premise that there was insufficient evidence from which a juror could find an intent on his part that recalcitrant victims be shot. However, as stated above, there was ample evidence from which a jury could infer that intent. Lennon told Ali that a gun would be used and showed him the gun. Lennon intended to shoot uncooperative victims, and threatened to do so in Ali's presence. Ali himself demonstrated a seriousness of purpose by punching one of the victims in the face simply because he hesitated in handing over his money. Ali makes much of the fact that there is no direct evidence of his intent, but there rarely is such evidence. The jury could readily have inferred it from the circumstances, and Ali thus cannot satisfy his heavy burden of establishing the insufficiency of the evidence.

Finally, Ali's reliance on the rule of lenity is misplaced. Whether conditional intent is sufficient to establish the intent element of the carjacking offense is not a question of statutory construction, but of criminal law.

The jury instructions on the element of intent in the carjacking counts included the following:

In some cases, intent is conditional. That is, a defendant may intend to engage in certain conduct only if a

certain event occurs. In this case, the government contends that the defendant intended to cause death or seriously bodily harm if the alleged victims had refused to turn over their cars. If you find beyond a reasonable doubt that the defendant had such an intent, the government has satisfied this element of the offense.

If you find that the co-defendant, Vernon Lennon, acted with the intent to cause death or serious bodily injury, that is not sufficient. You must find that the defendant shared in that intent before you can conclude that this element has been satisfied. I remind you that you must consider each count separately.

In view of the foregoing, those instructions, and the charge as a whole, properly permitted the jury, if it accepted the government's evidence, to find Ali guilty of carjacking.

D. Conclusion

It is likely that many incidents of what both Congress and the general public would call carjacking are no longer prohibited by § 2119. Without doubt, some car robbers threaten death or serious bodily injury, but intend to flee the scene rather than escalate the confrontation if the demand for the car is rebuffed. A defendant with that state of mind may not be subject to prosecution under § 2119, even if the threat succeeds and he robs the car.

However, because Ali had the specific intent required by the statute, albeit conditionally, his motion to set aside the verdicts and for a new trial is denied.

So Ordered.

JOHN GLEESON, U.S.D.J

Dated: Brooklyn, New York
April 5, 1996

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1877 – August Term, 1996

(Argued June 25, 1997 Decided September 16, 1997)

Docket No. 96-1563

UNITED STATES OF AMERICA,

Appellee,

- v. -

TEDDY ARNOLD; CHARLES ROBINSON; DARREL [SIC] JONES; DAVID VALENTINE; PAUL SCAGLIONE; and JEFFREY DRAKE

Defendants,

FRANCOIS HOLLOWAY/a/k/a ABDU ALI

Defendant-Appellant.

Before:

MCLAUGHLIN and MINER, *Circuit Judges,*
and SCULLIN, *District Judge.*[1]

Appeal from a judgment entered in the United States District Court for the Eastern District of New York (Gleeson, J.) convicting defendant, following a jury trial, of conspiracy to operate a "chop shop," operation of a

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[1] The Honorable Frederick J. Scullin, Jr. of the United States District Court for the Northern District of New York, sitting by designation.

chop shop, three counts of carjacking, and three counts of using a firearm in the commission of a crime of violence.

Affirmed.

Judge Miner dissents in a separate opinion.

KEVIN J. KEATING, Esq., Law Office of Kevin J. Keating, Garden City, New York, *for Defendant-Appellant.*

DOLAN L. GARRETT, Assistant United States Attorney, Brooklyn, New York (Zachary W. Carter, United States Attorney, Eastern District of New York, Brooklyn, New York, of counsel), *for Appellee.*

SCULLIN, *District Judge:*

Defendant-Appellant Francois Holloway appeals from a judgment entered in the United States District Court for the Eastern District of New York (Gleeson, J.), following a jury trial, convicting Holloway of numerous offenses connected with his participation in several carjackings in Queens, New York. Holloway was convicted of one count of conspiracy to operate a "chop shop" in violation of 18 U.S.C. § 371 (count one); one count of operating a chop shop in violation of 18 U.S.C. § 2322 (count two); three counts of carjacking in violation of 18 U.S.C. § 2119 (counts seven, nine, and eleven); and three counts of using a firearm in the commission of a crime of violence in violation of 18 U.S.C. § 924(c) (counts eight, ten, and twelve). Holloway was sentenced to 60 months

on count one; 151 months on count two, to run concurrently with count one; 151 months on each of counts seven, nine, and eleven, to run concurrently with each other and counts one and two; 5 years on count eight, to run consecutively; and 20 years each on count ten and count twelve, each to run consecutively. Defendant was also sentenced to terms of supervised release and a special assessment of $400.

On appeal, Holloway contends that: (1) the district court erroneously charged the jury on the intent element of the carjacking statute; (2) his trial counsel rendered constitutionally ineffective assistance; and (3) the trial court improperly imposed consecutive sentences pursuant to Holloway's firearm convictions.

BACKGROUND

Holloway's conviction stems from his involvement in a "chop shop" operation located at 115th Drive in Queens, New York. In September 1994, Teddy Arnold recruited his son, Vernon Lennon, to begin stealing cars to be taken to the chop shop for dismantling. Lennon, in turn, recruited two individuals, David Valentine and Holloway, to assist him in his car thefts. The co-conspirators agreed that they should use a firearm during their thefts, and Lennon showed both Valentine and Holloway a .32 caliber revolver he intended to use for that purpose.

The first charged carjacking involving Holloway and Lennon occurred in October 1994. On October 14, Holloway and Lennon followed a 1992 Nissan Maxima driven by sixty-nine year-old Stanley Metzger. When Metzger stopped and parked across from his residence, Lennon

approached Metzger and pointed his revolver at him, demanding his car keys. At first, Metzger gave his house keys to Lennon, who rejected them and demanded his car keys. Metzger testified that Lennon told him, "I have a gun. I am going to shoot." Thereafter, Metzger surrendered his keys and also his money, and Lennon drove away in the Maxima.

The following day, Lennon and Holloway followed a 1991 Toyota Celica driven by Donna DiFranco. When DiFranco parked, Lennon approached her, leveled his gun at her, and demanded her money and her car keys. After DiFranco disengaged the car alarm and unlocked her "club" securing the steering wheel, Lennon drove off in her car.

That same day, Holloway and Lennon followed a 1988 Mercedes-Benz driven by Ruben Rodriguez until he parked near his home at Jamaica Estates. Both Lennon and Holloway approached the driver this time. Rodriguez, sensing something was wrong, retreated to his car. Lennon produced his gun and threatened, "Get out of the car or I'll shoot." Rodriguez complied and Lennon demanded his money and car keys. When Rodriguez hesitated, Holloway punched him in the face. Rodriguez surrendered the items and fled on foot, yelling for help. Lennon drove off in the Mercedes, and Holloway followed in another car.

At trial, the Government also presented evidence of two additional uncharged carjackings involving Lennon and Holloway. One involved the theft of a 1987 Nissan Maxima which was stolen from Betty Eng as she parked in her driveway on October 12, 1994. The other

uncharged carjacking occurred on October 19, 1994. On that day, Holloway and Lennon attempted to steal a 1994 Nissan Sentra from Sara Markett when she parked her car on 193rd Street in Queens. Lennon threatened Markett, telling her, "Give me your keys or I will shoot you right now." Thereafter, Markett surrendered her keys and ran screaming into a nearby hair salon. The theft was foiled by an off-duty police officer, Adam Lamboy, who happened to be in the hair salon at that time. Upon seeing Lennon in Markett's car, Lamboy yelled, "Police, don't move." Lennon made a motion toward his waist band prompting Lamboy to draw his weapon. Lennon then fled to a red Toyota driven by Holloway, and the two escaped.

On November 22, 1994, two of the carjacking victims, Ruben Rodriguez and Sara Markett, identified Holloway as one of the carjackers in a police line-up. Following his identification, Holloway confessed to the police that he had participated with Lennon in three carjackings involving a silver Mercedes-Benz, a black Nissan Maxima, and a gray Nissan. Immediately prior to trial, Lennon pled guilty to several carjacking charges and eight automatic teller machine ("ATM") robberies. Thereafter, Lennon testified at trial as a government witness. Lennon testified as to the events set forth in the above carjackings, as well as seven additional carjackings in which he participated with Valentine. Lennon testified that his plan was to steal the victims' cars without harming the victims; however, Lennon also testified that he would have used the gun if one of the victims had given him "a hard time" or had resisted.

The Government also presented testimony at trial from Rodriguez, Metzger, DiFranco, Eng, and Lamboy. These witnesses presented factually consistent testimony depicting the various carjackings as set forth above. With the exception of Rodriguez, none of the victims was injured during the course of the carjackings, and Rodriguez did not require medical attention.

The defense declined to call any witnesses. Over the objection of defense counsel, Judge Gleeson charged the jury on the doctrine of conditional intent, as it applied to the intent element for the carjacking offenses. Judge Gleeson instructed the jury that an intent to cause death or serious bodily harm conditioned on whether the victims surrendered their cars was sufficient to satisfy the specific intent requirement of the statute. As stated, the jury found Holloway guilty on all eight counts charged in the indictment.

Following the verdict, Holloway moved for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, or in the alternative, for reconsideration of his unsuccessful Rule 29 motion. *See United States v. Holloway*, 921 F. Supp. 155, 156 (E.D.N.Y. 1996). Holloway argued that the Court erred in charging the jury on conditional intent in light of the carjacking statute's unambiguous specific intent requirement, which requires a carjacker to have the intent to cause death or serious bodily harm in order to be culpable.

In a decision issued on April 5, 1996, Judge Gleeson denied Holloway's post-trial motion. On August 16, 1996, Holloway was sentenced, and, on August 28, 1996, judgment of conviction was entered. This appeal followed.

DISCUSSION

Holloway raises three issues on appeal: (1) whether Judge Gleeson erred in instructing the jury on "conditional intent"; (2) whether the performance of Holloway's trial counsel was constitutionally deficient so as to require reversal and a new trial; and (3) whether Judge Gleeson abused his discretion by sentencing Holloway to consecutive sentences pursuant to 18 U.S.C. § 924(c).

I. *Conditional Intent Instruction*

Holloway maintains that Judge Gleeson committed reversible error by charging the jury on the doctrine of "conditional intent." Holloway contends that: (1) the federal carjacking statute clearly and unambiguously requires that a defendant possess a specific intent to cause death or serious bodily harm (hereinafter "specific intent to kill"), and (2) conditional intent, by definition, does not satisfy this requirement.

A. 1994 Amendments to the Carjacking Statute

Holloway argues that the statute, as amended, is clear and unambiguous on its face, thus preventing the trial court, or this Court for that matter, from inquiring into the intent of Congress or ascribing some alternate construction of the statute based on any perceived error in drafting. *See Rubin v. United States*, 449 U.S. 424, 430, 66 L. Ed. 2d 633, 101 S. Ct. 698 (1981)

Prior to the 1994 Amendments, the federal carjacking statute, 18 U.S.C. § 2119, read as follows:

> Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall –
>
> (1) be fined under this title or imprisoned not more than 15 years, or both,
>
> (2) if serious bodily injury (as defined in section 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242 of this title) results, be fined under this title or imprisoned not more that 25 years, or both, and
>
> (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.

The Violent Crime Control and Law Enforcement Act of 1994 amended this statute in the following manner:

> (14) CARJACKING. – Section 2119(3) of title 18, United States Code, is amended by striking the period after "both" and inserting ", or sentenced to death."; and by striking ", possessing a firearm as defined in section 921 of this title," and inserting ", with the intent to cause death or serious bodily harm".

Pub. L. 103-322, § 60003(a)(14). With these revisions, the statute now reads:

> Whoever, *with the intent to cause death or serious bodily harm* takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence

of another by force and violence or by intimidation, or attempts to do so, shall –

(1) be fined under this title or imprisoned not more than 15 years, or both,

(2) if serious bodily injury (as defined in section 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242 of this title) results, be fined under this title or imprisoned not more that 25 years, or both, and

(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, *or sentenced to death.*

18 U.S.C. § 2119 (1997) (emphasis added).

The amendments to the carjacking statute contained in the Violent Crime Control and Enforcement Law Act of 1994 came about as an attempt to expand the number of federal crimes subject to the death penalty. *See* 140 Cong. Rec. E857-03 (statement of Rep. Franks); 140 Cong. Rec. S12421-01, S12458 (statement of Sen. Nunn); 139 Cong. Rec. S15295-01, 15301 (statement of Sen. Lieberman). The thrust of the various early versions of the amendments was to add the death penalty as a sentencing option when death resulted from a carjacking, and also, in some versions, to eliminate the firearm requirement. *See* H.R. 4197, 103d Cong. § 125(h) (1994) (removed firearm requirement and added death penalty); H.R. 3355, 103d Cong. § 203(a)(15) (1993) (version as of October 19, 1993 removed the firearm requirement and added death penalty); H.R. 3355, 103d Cong. § 703(e) (1994) (version as of

April 21, 1994 added the death penalty only). Congressional opposition to the amendments coalesced into two camps: those who opposed the death penalty in general, and those who opposed the expansion of federal criminal jurisdiction. *See* 140 Cong. Rec. S12309-02, S12311 (statement of Sen. Leahy contained in Conference Report on H.R. 3355); 140 Cong. Rec. H2322-02, H2325 (statement by Rep. Glickman on amendment introduced by Rep. Scott to remove the death penalty addition to the Violent Crime Control Act).

The insertion of the heightened intent requirement at issue here occurred at a relatively late stage in the legislative process – while the Act was under consideration in Conference Committee in the summer of 1994. *See* 140 Cong. Rec. H8772-03, H8819, H8872 (Conference Report on H.R. 3355 dated August 21, 1994). On September 13, 1994, the Act was signed into law. There is no indication in the Congressional Record as to the purpose of the late-added heightened intent requirement. However, it is clear from a review of legislative history that Congress intended to broaden the coverage of the federal carjacking statute by the passage of the 1994 amendments, and that the application of the heightened intent requirement to all three of the carjacking categories was, in all likelihood, an unintended drafting error. *See* 139 Cong. Rec. S15295-01, 15301 (statement of Sen. Lieberman) ("This amendment will broaden and strengthen that law so our U.S. attorneys have every possible tool available to them to attack the problem."); 140 Cong. Rec. E857-03, E858 (extension of remarks by Rep. Franks) ("We must send a message to the criminal that committing a violent crime will carry a severe penalty. This legislation will make an

additional 22 crimes including carjacking and drive-by shootings, subject to the death penalty.").

At least two courts have speculated that Congress probably intended the heightened intent requirement to apply only to cases where the carjacking resulted in death, that is, those cases falling under § 2119(3). *See United States v. Anderson*, 108 F.3d 478, 482-83 (3d Cir. 1997), *petition for cert. filed* (U.S., June 3, 1997) (No. 96-9338); *Holloway*, 921 F. Supp. at 158. *But see United States v. Randolph*, 93 F.3d 656, 660-61 (9th Cir. 1996). In support of this interpretation, these courts point to the initial wording of the 1994 amendment, *"Section 2119(3) of title 18, United States Code, is amended by. . . ."* as limiting language for the two specific changes set forth within. *See Anderson*, 108 F.3d at 478-79 (quoting Pub. L. No. 103-322, § 60003(a)(14)) (emphasis added); *see also Holloway*, 921 F. Supp. at 158.

Regardless of the actual intent of Congress in adding this amendment, the practical effect of adding this requirement is to severely limit the scope of conduct covered by the statute. The addition of the heightened intent requirement into the body of the carjacking statute limits federal jurisdiction over all carjacking offenses to only those in which death or serious bodily harm was intended. Notwithstanding that such a result was unintended, the Court declines any invitation to redraft the statute – that is a task better left to the legislature.[2] Thus,

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[2] We note that since the 1994 amendments there have been several legislative initiatives introduced in Congress that seek to remove the intent portion of the carjacking statute. *See* The Violent Crime Control and Law Enforcement Act of 1995, S. 3, 104th Cong. § 717 (1995) (titled "Elimination of Unjustified Scienter Element for Carjacking"); Omnibus Crime Control Act of 1997, S. 3, 105th Cong. § 807 (1997) (titled "Elimination of Unjustified Scienter Element for Carjacking").

the sole issue this Court must decide is whether the "specific intent to kill," as now reflected in 18 U.S.C. § 2119, encompasses a conditional intent, as defined by Judge Gleeson in his instruction to the jury.

B. Judge Gleeson's Instruction

In his instruction to the jury, Judge Gleeson charged, in relevant part:

> Evidence that the defendant intended to use a gun to frighten the victims is not sufficient in and of itself to prove an intent to kill or cause serious bodily harm. It is, however, one of the facts you may consider in determining whether the government has met its burden.
>
> You may also consider the fact that no victim was actually killed or seriously injured when you consider the evidence or lack of evidence as to the defendant's intent.
>
> In some cases, intent is conditional. That is, a defendant may intend to engage in certain conduct only if a certain event occurs.
>
> In this case, the government contends that the defendant intended to cause death or serious bodily harm if the alleged victims had refused to turn over their cars. If you find beyond a reasonable doubt that the defendant had such an intent, the government has satisfied this element of the offense.

> If you find that the co-defendant, Vernon Lennon, acted with the intent to cause death or serious bodily injury, that is not sufficient. You must find that the defendant shared in that intent before you can conclude that this element has been satisfied.

Holloway argues that the above instruction was erroneous because it allowed the jury to convict him based on lesser mental state than is required by the carjacking statute. Holloway contends that the plain meaning of "specific intent to kill" does not include the lesser mental state of "conditional intent," because a conditional intent to kill is no more than a state of mind where death is a foreseeable event and, as such, is equivalent to a mental state of recklessness or depraved indifference. Holloway contends that such a lesser mental state plainly does not satisfy the intent requirement of the carjacking statute.[3]

The Court agrees that a conditional intent to cause death or serious bodily harm and "reckless indifference" both involve foreseeability; however, conditional intent requires a much more culpable mental state. A carjacker who plans to kill or use deadly force on a victim in the event that his victim fails to comply with his demands has engaged in willful and deliberate consideration of his actions. Under these circumstances, death is more than merely foreseeable, it is fully contemplated and planned for. Such a mental state is clearly distinguishable from the

---

[3] Holloway cites to Second Circuit precedent which holds that proof of a reckless or wanton state of mind cannot constitute a specific intent to kill. *See, e.g., United States v. Kwong*, 14 F.3d 189, 194-95 (2d Cir. 1994).

characterization of conditional intent advanced by Holloway, which only has the carjacker *aware* of a *risk* of death of which he chooses to disregard.

Holloway further argues that the Supreme Court case, *Tison v. Arizona*, 481 U.S. 137, 107 S. Ct. 1676 (1987), forecloses the inclusion of conditional intent within the scope of an ordinary specific intent to kill. In *Tison*, co-defendants Raymond and Ricky Tison planned an armed jail break to free their father, Gary Tison, and another inmate from the Arizona State Prison. *Id.* at 139. After a successful escape from prison, a flat tire in their getaway car led to the stopping and theft of a family's car in the desert outside of Flagstaff, Arizona. *See id.* at 140. The defendants witnessed their father brutally execute the family who had been in the car. *See id.* at 141. The defendants were found guilty of aggravated felony-murder and sentenced to death. *See id.* at 142. In the context of reviewing a collateral attack on the imposition of the death penalty, the Supreme Court found that under the factual circumstances presented, the defendants lacked a "specific intent to kill," and at most had a culpable mental state of reckless indifference to human life. *Id.* at 152. Holloway seizes on this language, characterizing conditional intent as an analogous mental state to that ascribed to the defendants in *Tison*. Holloway argues that, at best, the proof shows that he and Lennon shared a conditional intent to kill, which only meant that it was foreseeable that death could result from their various carjackings.

The facts of *Tison* are plainly distinguishable from the case at bar. In *Tison* some violence was foreseeable to the

defendants in effecting the jailbreak, however, the murders for which the defendants were convicted were precipitated by a completely unplanned event, the flat tire in the desert. Thus, while it may have been foreseeable to them that death would occur in the course of the escape, the murders that flowed from their breakdown in the desert were not the result of a willful and deliberate plan.

Furthermore, the inclusion of a conditional intent to harm within the definition of specific intent to harm is a well-established principle of criminal common law. In his decision denying Holloway's Rule 33 motion, Judge Gleeson cited to state criminal law authority as support for his conditional intent charge. *See Holloway*, 921 F. Supp. at 159 (citing W.R. LaFave and A.W. Scott, Jr., *Handbook on Criminal Law* § 28 at 200 (1972); Model Penal Code § 2.02(6) (American Law Institute); *People v. Connors*, 253 Ill. 266, 97 N.E. 643 (1912); *Hairston v. Mississippi*, 54 Miss. 689 (1877)). Following his decision, the Third Circuit in *United States v. Anderson* cited to Judge Gleeson's opinion with approval, finding that "conditional intent" was included within the specific intent required by the carjacking statute. 108 F.3d at 483, 485. The *Anderson* court also cited to additional authority confirming this principle of criminal law, including the incorporation of the doctrine of conditional intent into some state penal codes. *See* Del. Code Ann. tit. 11 § 254 (1996) ("The fact that a defendant's intention was conditional is immaterial unless the condition negatives the harm or evil sought to be prevented by the statute defining the offense."); 18 Pa. Cons. Stat. Ann. 18 § 302(f) (West 1997) ("Requirement of intent satisfied if intent is conditional – When a particular intent is an element of an offense, the

element is established although such intent is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense."); Haw. Rev. Stat. § 702-209 (1996) ("When a particular intent is necessary to establish an element of an offense, it is immaterial that such intent was conditional unless the condition negatives the harm or evil sought to be prevented by the law prohibiting the offense."); *see also Shaffer v. United States*, 308 F.2d 654, 654-55 (5th Cir. 1962); *People v. Vandelinder*, 481 N.W.2d 787, 788-89, 192 Mich. App. 447 (1992); *Commonwealth v. Richards*, 363 Mass. 299, 293 N.E.2d 854, 860 (1973). *But see State v. Irwin*, 285 S.E.2d 345, 349 (N.C. Ct. App. 1982).

This Court also finds ample persuasive authority supporting the inclusion of conditional intent within the scope of the specific intent requirement. *See People v. Thompson*, 209 P.2d 819, 820 (Cal. Ct. App, 1949); *People v. Henry*, 190 N.E. 361, 361-62 (Ill. 1934); *Johnson v. State*, 605 N.E.2d 762, 765 (Ind. Ct. App. 1992); *Gregory v. State*, 628 P.2d 384, 386 (Okla. Crim. App. 1981); *see also* 40 Am. Jur. 2d Homicide § 571 (1968) ("The question whether an assault accompanied by a threat to kill unless a demand is complied with is an assault with intent to kill or murder has generally been answered in the affirmative. . . . "). Furthermore, and most importantly, incorporating conditional intent within the specific intent language of the carjacking statute comports with a reasonable interpretation of the legislative purpose of the statute. The alternative interpretation would have the federal carjacking statute covering only those carjackings in which the carjacker's sole and unconditional purpose at the time he committed the carjacking was to kill or

maim the victim. Such an interpretation would dramatically limit the reach of the carjacking statute. "It is well-established that 'in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and its object and policy.' " *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313 (2d Cir. 1995) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51, 107 S. Ct. 1549, 1554 (1987)). A statute should not be literally applied if it results in an interpretation clearly at odds with the intent of the drafters. *See id.* While the Court cannot and should not rewrite a poorly drafted statute, it has an obligation to interpret a statute so as to give it reasonable meaning.

After reviewing the substantial body of state law addressing this issue, and the clear legislative purpose of 18 U.S.C. § 2119, the Court finds that an intent to kill or cause serious bodily harm conditioned on whether the victim relinquishes his or her car is sufficient to fulfill the intent requirement set forth in the federal carjacking statute.[4] *Accord Anderson*, 108 F.3d at 485. As such, we accept

---

[4] The Ninth Circuit seemingly came to the opposite conclusion in *United States v. Randolph*, 93 F.3d 656, 665 (9th Cir. 1996), when it stated, "[t]he mere conditional intent to harm a victim *if* she resists is simply not enough to satisfy § 2119's new specific intent requirement." However, in *Randolph* the only evidence of intent was a threat made by one of the defendants to the victim that " 'she would be okay' if she '[did] what was told of her.' " *Id.* The Ninth Circuit held that "more than a mere threat is required to establish a specific intent to kill or harm." *Id.* We agree with the Ninth Circuit that without more, a mere threat of harm is not sufficient to establish a specific intent to kill. In fact, Judge Gleeson so charged in his jury instruction.

the well-reasoned opinion of the court below, and hold that Judge Gleeson did not err when he instructed the jury on conditional intent.

II. *Ineffective Assistance of Counsel*

Holloway's second ground for appeal is that he received constitutionally ineffective assistance of counsel, requiring the reversal of his conviction and a new trial. Holloway argues that even though his defense counsel relied on a legally sound argument premised on the lack of specific intent, once Judge Gleeson rejected his argument, Holloway's conviction was a foregone conclusion. Holloway argues that his trial counsel should have presented his specific intent defense, while at the same time vigorously contesting the evidence concerning all of the other elements in question.

Claims for ineffective assistance of counsel are analyzed under the framework set forth in *Strickland v. Washington*, 466 U.S. 668, 686 (1984), which requires that a defendant show "(1) that his attorney's performance fell below an 'objective standard of reasonableness,' and (2)

We do, however, disagree with the Ninth Circuit's dicta that equated a threat of harm to conditional intent. *See id.* The court stated, "[the defendant's] threat was tantamount to a conditional intent to harm." *Id.* While a threat is certainly evidence of a conditional intent to harm, conditional intent is not equivalent to a threat, it is much more. Conditional intent implies some indication that the defendant means to make good on his threat to harm. An *idle* threat can never constitute an intent to kill.

that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Kieser v. New York*, 56 F.3d 16, 18 (2d Cir. 1995) (quoting *Strickland*, 466 U.S. at 688, 694).

Even if Holloway could establish the first prong of the *Strickland* test, he has not met his burden on the second prong. The trial counsel's "intent" defense was appropriately directed at the most questionable aspect of the Government's case. Trial counsel's strategy to concede the other elements of the offense was reasonable in light of the overwhelming evidence in the case, i.e., Lennon's testimony that Holloway assisted him in the carjackings, several victims' identification of Holloway, and Holloway's own confession. Holloway's assertion that the outcome of the trial would have somehow been different had his trial counsel more vigorously contested this testimony is conclusory and unpersuasive given the record before the Court. As such, Holloway's appeal in this respect lacks merit.

III. *Imposition of Consecutive Sentences*

Finally, Holloway contests the imposition of consecutive sentences on his firearm convictions pursuant to 18 U.S.C. § 924(c). Holloway concedes that this Court has already held in *United States v. Mohammed* that issuing consecutive sentences under the carjacking statute and the firearm statutes based on the same carjacking is constitutionally permissible. 27 F.3d 815, 820-21 (2d Cir. 1994). However, Holloway argues that because the trial court lowered the standard of proof for carjacking by

allowing a verdict based on conditional intent, then the trial court should be precluded from imposing consecutive sentences based on those offenses. The Court finds this argument to be wholly without merit.

CONCLUSION

Based on the foregoing, we affirm the judgment of the district court.

MINER, *Circuit Judge*, dissenting:

Because I perceive no basis in the plain language of the statute or in the legislative history for an element of conditional intent in the crime under examination here, I respectfully dissent.

As originally cast, the carjacking legislation established as a federal crime the taking or attempted taking of a motor vehicle having some connection with interstate commerce from the person or presence of another by force, violence or intimidation on the part of one possessing a firearm. *See* 18 U.S.C. § 2119 (prior to 1994 Amendment). Enhanced penalties for the infliction of serious bodily injuries or resulting death were provided. *See id.* § 2119(2), (3). The statute after amendment defines the crime as the taking or attempted taking of a motor vehicle having some connection with interstate commerce from the person or presence of another by force or violence on the part of one who intends to cause death or serious bodily harm. *See id.* (as amended). The penalty if death results is further enhanced to include the death penalty. *See id.* § 2119(3). The distinctions to be made between the

original and the amended statute are clear; the firearm possession requirement is deleted; a specific intent element is added; and the penalty provision is expanded.

Despite the foregoing, my colleagues approve the district court's failure to instruct the jury as the statute requires regarding the specific intent to cause death or serious bodily harm, and further approve the following substituted instruction, which allows for conviction on proof of conditional intent:

> In this case, the government contends that the defendant intended to cause death or serious bodily harm *if the alleged victims had refused to turn over their cars*. If you find beyond a reasonable doubt that the defendant had such an intent, the government has satisfied this element of the offense.

(Emphasis added.) What is the provenance of such an instruction? It surely is not the language of the statute itself. It is not even the indictment, for the indictment parrots the statute. The district court therefore was wrong in charging the jury that the government had advanced a conditional intent contention.

In arriving at their conclusion, my colleagues first turn to the legislative history and properly note that the amendment to the carjacking statute represented an effort to expand the number of crimes subject to the death penalty, including carjacking where death results. There is also an indication of an intent on the part of Congress to eliminate the firearm requirement. Ultimately, as all agree, the heightened intent requirement was added to

the final amending legislation by the Congressional Conference Committee. There is no discernible information on why or how this element was added.

How, then, can it be said that "it is clear from a review of legislative history that Congress intended to broaden the coverage of the federal carjacking statute by the passage of the 1994 amendments, and that the application of the heightened intent requirement to all three of the carjacking [penalty] categories was, in all likelihood, an unintended drafting error[?]" Maj. Opn. at 86. No member of Congress has ever referred to "an unintended drafting error," and the congressional intent may well have been to narrow in some respects, as well as broaden in some respects, the statute's coverage.

The scienter requirement of the amended statute has been interpreted in different ways. While one circuit court thinks that Congress intended the specific intent provision to apply only where the carjacking resulted in death, *see United States v. Anderson*, 108 F.3d 478, 482 (3d Cir. 1997), another circuit court considers that the purpose of the amendment was to convert the entire general intent offense to a specific intent offense, *see United States v. Randolph*, 93 F.3d 656, 661 (9th Cir. 1996). But we have no authority to correct an "unintentional drafting error" where there is no reason to say that there is an "error" or that the statutory provision inserted is "unintended." By adding a conditional intent element to correct what the court perceives to be an error, we ignore the teaching of the Supreme Court that "[to] supply omissions transcends the judicial function." *Iselin v. United States*, 270 U.S. 245, 251 (1926), *quoted in West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 101 (1991).

We do know that since the enactment of the 1994 amendment to the carjacking statute, Congress has made at least three attempts to eliminate what was termed the "unjustified scienter element for carjacking." Omnibus Crime Control Act of 1997, S. 3, 105th Cong. § 807; Violent Crime Control and Law Enforcement Improvement Act of 1995, S. 3, 104th Cong. § 717 ("VCCLEIA"); *see* Anti-Gang and Youth Violence Control Act of 1997, S. 362, 105th Cong. § 2113 ("AGYVCA"). These statutes would eliminate entirely the requirement that the government prove that the defendant possessed the intent to cause death or serious bodily harm. *See, e.g.*, VCCLEIA § 717 ("Section 2119 of title 18, United States Code, is amended by striking ', with the intent to cause death or serious bodily harm'."). It is unclear what happened to the earlier attempts to remove the intent element from § 2119, but the AGYVCA, the most recent effort, presently appears to be before the Senate Judiciary Committee.

The only discussion we have concerning the attempts to remove the intent element comes from Senator Leahy's comments in introducing the AGYVCA. The Senator explained:

> Prior to the enactment of [the Violent Crime Control and Law Enforcement Act], the offense applied only if the defendant possessed a firearm. Section 60003(a)(14) of that law appropriately deleted the firearm requirement, as had been proposed in the Senate-passed bill, but in conference a new scienter element was added that the defendant must have intended to cause death or serious bodily injury. This unique new element will inappropriately make carjackings difficult or impossible to prosecute in certain

> situations. . . . The new requirement . . . will likely be a fertile [source] of argument for defendants in cases in which no immediate threat of injury occurs, such as where a defendant enters an occupied vehicle while it is stopped at a traffic light and physically removes the driver. Even when a weapon is displayed, the defendant may argue that although it was designed to instill fear, he had no intent to harm the victim had the victim in fact declined to leave the car.

143 Cong. Rec. S1659, S1661-62 (Feb. 26, 1997) (statement of Sen. Leahy).

Aside from the fact that Senator Leahy's comments represent the views of only one member of Congress, there is nothing in those comments to indicate that the "scienter element," as he calls it, was not intentionally placed in the statute when the 1994 Amendment was enacted. He is saying only that the element should be taken out. But, so far, his colleagues have not agreed that this should be done.

In this regard, it is of more than passing interest that carjacking is essentially a state offense, and it may well be the intent of Congress to limit the scope of the federal offense. *See generally* Geraldine Szott Moohr, *The Federal Interest in Criminal Law*, 47 Syracuse L. Rev. 1127 (1997). Several states have enacted specific carjacking statutes. *See, e.g.*, Fla. Stat. § 812.133 (1994); Md. Code Ann., Crimes and Punishments § 348A (1996); Miss. Code Ann. § 97-3-117 (1994); Va. Code Ann. § 18.2-58.1 (Michie 1996). The common elements of each of these statutes are the taking of a motor vehicle by threat of force or violence. *See, e.g.*, S.C.Code Ann. § 16-3-1075(B) (Law Co-op. Supp.

1996) ("A person is guilty of the felony of carjacking who takes, or attempts to take, a motor vehicle from another person by force and violence or by intimidation while the person is operating the vehicle or while the person is in the vehicle."). Some states also have enacted specific armed carjacking statutes to address carjackings in which a dangerous weapon is used. *See, e.g.*, D.C. Code Ann. § 22-2903(b)(1) (1996).

Those states that do not have a specific carjacking statute, such as New York, prosecute carjackings under the state's robbery statute. *See, e.g., Kansas v. Vincent*, 908 P.2d 619, 621 (Kan. 1995) (defendant charged with felony murder, conspiracy to commit robbery and aggravated robbery in relation to a carjacking resulting in death); *New York v. Lee*, 652 N.Y.S.2d 2, 3 (App. Div. 1st Dept.1996) (defendant charged with first degree robbery in the gunpoint theft of a car). As with the specific carjacking statutes, these robbery statutes apply to thefts involving the use of threat or force. *See, e.g.*, N.Y. Penal Law § 160.10(3) (McKinney 1997) ("A person is guilty of robbery in the second degree when he forcibly steals property and when . . . [t]he property consists of a motor vehicle. . . . "). Thus, even where there is no specific carjacking statute, carjackings can be prosecuted adequately under state law.

Ultimately, my colleagues seem to reject the legislative intent approach, saying that "[n]otwithstanding that such a result was unintended, the Court declines any invitation to redraft the statute – that is a task better left to the legislature." Maj. Opn. at 9. (But that in fact is what they have done here.) The majority opinion goes on to find a conditional intent implicit in the carjacking statute

as amended, but there is absolutely no basis for such a construction. The intent required is spelled out explicitly in the statute. The other reason assigned for reading conditional intent into the statute – that "the inclusion of a conditional intent to harm within the definition of specific intent to harm is a well-established principle of criminal common law," Maj. Opn. at 12 – is irrelevant here. There is no federal common law of crimes, *see United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812), state criminal law supplies no authority for interpreting a federal criminal statute, and the Model Penal Code, cited in the majority opinion, never has been adopted by Congress. In point of fact, I can find no federal criminal statute that provides conditional intent as an element of the crime defined. Nor is there a general provision in the Federal Criminal Code, as there is in some state criminal codes, that the requirement of intent is satisfied by proof of conditional intent. *See, e.g.*, Haw. Rev. Stat. § 702-209 (1993) ("When a particular intent is necessary to establish an element of an offense, it is immaterial that such intent was conditional unless the condition negatives the harm or evil sought to be prevented by the law prohibiting the offense.")

To avoid a clear judicial usurpation of congressional authority, I would reverse and remand for a retrial upon instructions conforming with the foregoing analysis.

Supreme Court of the United States

No. 97-7164

Francois Holloway, aka Abdu Ali,

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Second Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

April 27, 1998

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(5)

No. 97-7164

In The

Supreme Court of the United States

October Term, 1997

FRANCOIS HOLLOWAY, also known as ABDU ALI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the specific intent to cause physical harm or death contained as an essential element in the carjacking statute encompasses an intent which is only conditional.

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STATEMENT OF THE BASIS FOR JURISDICTION

Petitioner appeals from an order of the United States Court of Appeals for the Second Circuit filed on September 16, 1997, (the mandate was issued on October 7, 1997) which affirmed, in a majority opinion, the judgment of the United States District Court, Eastern District of New York (Gleeson, J.) entered on August 28, 1996, upon a jury verdict convicting petitioner of conspiracy to operate (18 U.S.C. § 371) and the operation of a chop shop (18 U.S.C. § 2322), three separate counts of carjacking (18 U.S.C. § 2119); and three separate counts of the use of a firearm during a crime of violence (18 U.S.C. § 924(c)(1)).

Petitioner was sentenced to 60 months on his conviction of conspiracy, concurrent sentences of 151 months on his convictions for operating a chop shop and his conviction for the three carjacking counts and consecutive 5, 20 and 20 year sentences on his convictions under three separate § 924(c) counts.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1). The petition for certiorari was granted on April 27, 1998.

STATUTES INVOLVED

In 1992, *18 U.S.C. § 2119* stated:

> Whoever, possessing a firearm as defined in section 921 of this Title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so shall –
>
> (1) be fined under this title or imprisoned not more than 15 years, or both,
>
> (2) if serious bodily injury (as defined in section 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and
>
> (3) if death results, be fined under this title or imprisoned for any number of years up to life or both.

The Violent Crime Control and Law Enforcement Act of 1994 amended the statute in the following manner:

> (14) CARJACKING – Section 2119(3) of Title 18, United States Code is amended by striking the period after "both" and inserting, "or sentenced to death."; and by striking, "possessing a firearm as defined in Section 921 of this Title," and inserting, "with the intent to cause death or serious bodily harm".

18 U.S.C. § 2119 now reads:

> Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or the presence of another by force, and violence or by intimidation, or attempts to do so, shall –
>
> (1) be fined under the title or imprisoned not more than 15 years, or both,
>
> (2) if serious bodily injury (as defined in section 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate Section 2241 or 2242 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and
>
> (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death.

STATEMENT OF THE CASE

Proceedings in the District Court

Petitioner, FRANCOIS HOLLOWAY, a/k/a ABDU ALI, was indicted in the Eastern District of New York for the crimes of conspiracy to operate (18 U.S.C. § 371) and the operation of a chop shop (18 U.S.C. § 2322) (Counts 1 and 2 of the indictment filed against him and several other codefendants), three separate counts of carjacking (18 U.S.C. § 2119) (Counts 7, 9, and 11 of the indictment); and three separate counts of the use of a firearm during a crime of violence (18 U.S.C. § 924(c)(1)) (Counts 8, 10 and 12 of the indictment). J.A. 4-6, 8-10.

During petitioner's jury trial, the primary witness against petitioner was the cooperating co-defendant Vernon Lennon. Lennon testified pursuant to a cooperation agreement with the government which involved a plea of guilty to two counts of the instant indictment, a single carjacking count and a 924(c) count. (107-08).[1]

Lennon testified that in 1994 he observed petitioner frequenting a chop shop where a codefendant Arnold dismantled cars. (96). Lennon related that pursuant to the request of his father, he began stealing cars which were to be taken to the chop shop for dismantling.

Lennon testified that at one time he had a conversation with petitioner in which he informed the latter that he carried a gun during his robberies of vehicles and even displayed his .32 caliber revolver to petitioner. He also related that both petitioner and Lennon were told to steal specific vehicles by Arnold. (103-04).

Lennon related that the crimes he committed with petitioner included the carjacking of a Toyota Celica (Count 11), a Mercedes Benz (Count 9), and a Maxima (Count 7). (115).

Lennon described the taking of the Maxima. (Count 7). He related that he and petitioner followed the vehicle and, after observing the driver exit the car, Lennon approached him and pointed a gun, whereupon the victim dropped the keys. Lennon retrieved the keys and drove the vehicle to the chop shop location. During the crime, petitioner remained seated in a waiting vehicle

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[1] Parenthetical references are to the trial transcript.

which he had driven to the location with Lennon. Although Lennon indicated that he was prepared to use the gun if the victim "had tried something", there was no actual intent to cause anyone serious injury during the event. (118-20).

Lennon also described the taking of the Mercedes Benz. (Count 9). In the course of this event, Lennon pointed a gun at the driver of the car, who had exited his vehicle, whereupon Lennon threatened to shoot him if he did not relinquish his keys. Lennon was accompanied by petitioner who struck the owner of the car in the face when he hesitated by backing away from the twosome. Lennon then took the Mercedes while petitioner followed behind in another vehicle. The victim did not suffer an injury which required medical treatment. There was no other conduct or words spoken in the course of this incident which manifested an intent to cause serious bodily injury. (120-27).

Lennon also testified concerning the theft of the Toyota Celica during which he and petitioner approached a driver and Lennon demanded her keys. The driver abandoned the vehicle while leaving the keys inside the car. Consequently, Lennon was able to steal the automobile without even displaying a firearm during the crime. (130-34). (Count 11).

Lennon never testified that either he or petitioner possessed an unconditional intent to harm any of the drivers of the stolen vehicles. In fact, the desired objective was to steal the vehicle without having to harm the victim. (135-40). The government never challenged Lennon's assertions that the intent to cause harm was

entirely conditioned upon resistance which never materialized.

Lennon testified that, with all of his car robberies, his plan was the same. He would display a gun in an effort to scare his victims into relinquishing their keys to their vehicle. He never intended to shoot his victims and the objective was to leave the owners of the vehicles unharmed. Although he was prepared to use his gun if the circumstances warranted its use, such circumstances never arose in any of the robberies in which he and petitioner were involved. (144-53).

Lennon also conceded that it was always he, not petitioner, who possessed a weapon during the carjackings. Lennon never testified that he informed petitioner that the gun was loaded. (158).

The government presented testimony from the victims of the carjackings, including Ruben Rodriguez. Rodriguez testified that he was struck in the face during the carjacking of his Mercedes. Rodriguez confirmed that he did not receive any medical treatment and that no shots were fired when he fled. (51-55).

The Rule 29 Motion

Following the presentation of the government's case, defense counsel moved for a dismissal of all carjacking and gun counts charged in the indictment (Counts 7 through 12), on the ground that the government failed to present legally sufficient proof that petitioner acted with the statutorily required specific intent to cause death or

serious bodily harm to any of the victims of the carjackings. Defense counsel argued that the cooperating witness testified that, during the commission of the thefts, it was never his intent to cause death or serious bodily harm. Moreover, he maintained that a "conditional intent" to cause harm had the carjackings been resisted failed to establish the specific intent element of the crime.

Defense counsel also argued that the concept of conditional intent was not provided for in the carjacking statute nor was it recognized under federal law.

Finally, defense counsel asserted that even if the concept of conditional intent was adopted by the court, there was no evidence that petitioner shared such a conditional intent with Lennon. Counsel argued that the absence of proof that Lennon ever communicated his intention to hurt a victim who resisted his carjacking efforts to petitioner and the complete lack of evidence that petitioner independently harbored such an intent compelled the court to grant the Rule 29 motion. (223-227).

The government opposed defense counsel's motion and argued that the concept of conditional intent is valid and that, on this level of culpability, the government presented sufficient evidence to warrant the case going to a jury. (228).

The Court denied the Rule 29 motion and ruled that conditional intent was applicable to the facts of the case. The court held that an intent to inflict death or serious bodily harm, should it become necessary, was sufficient to establish the specific intent required by the statute. (234).

The Court's Charge

The court rejected all defense arguments in opposition to the theory of conditional intent and instructed the jury on the concept as follows:

> The defendant's intent in committing the crime must have been to cause death or serious bodily harm. I remind you that intentional conduct is done willfully, with a bad purpose to do something the law forbids, in this case, to cause death or serious bodily harm to the person from whom the car was taken.
>
> It is the defendant's theory of the case that the evidence fails to prove that he acted with intent to cause death or serious bodily harm. If the government has failed to prove beyond a reasonable doubt that the defendant acted with the intent to kill or cause serious bodily harm to the particular victim, you must find him not guilty of that offense.
>
> The defendant is entitled to the presumption of innocence with regard to all of the elements of the offense including this element. That is, you must presume that the defendant did not possess the intent to kill or cause serious bodily harm and you must continue to give the benefit of that presumption to the defendant unless and until it is proven beyond a reasonable doubt that the defendant intended to cause death or serious bodily harm at the time of the events you are considering.
>
> Evidence that the defendant intended to use a gun to frighten the victims is not sufficient in and of itself to prove an intent to kill or cause serious bodily harm. It is, however, one of the facts you may consider in determining whether the government has met its burden.
>
> You may also consider the fact that no victim was actually killed or seriously injured when you consider the evidence or lack of evidence as to the defendant's intent.
>
> *In some cases, intent is conditional. That is, a defendant may intend to engage in certain conduct only if a certain event occurs.*
>
> *In this case, the government contends that the defendant intended to cause death or serious bodily harm if the alleged victims had refused to turn over their cars. If you find beyond a reasonable doubt that the defendant had such an intent, the government has satisfied this element of the offense.*
>
> If you find that the co-defendant, Vernon Lennon, acted with the intent to cause death or serious bodily injury, that is not sufficient. You must find that the defendant shared in that intent before you can conclude that this element has been satisfied.
>
> Let me also remind you, you must consider each count separately." J.A. 19-21 (emphasis added).

During deliberations, the jury sent out a note that stated they needed a copy of the law on intent. J.A. 23. In responding to the note, the court once again instructed the jury on its concept of conditional intent. J.A. 27-31.

The Verdict

Appellant was found guilty of all eight counts charged against him in the indictment.

The Post Verdict Motion

On April 5, 1996, the district court denied petitioner's renewal of his Rule 29 motion, made pursuant to Rule 33 of the Federal Rules of Criminal Procedure. In a written opinion, the court adhered to its original decision sustaining the government's proof on the basis of the concept of conditional intent. J.A. 32-47.

The Sentence

At sentencing, on August 16, 1996, the court sentenced petitioner to a sentence of 60 months on his conviction under the conspiracy to operate a chop shop count; concurrent sentences of 151 months on his conviction under the chop shop and carjacking counts; and consecutive sentences totaling an additional 45 years on his convictions under the § 924(c) counts.

A timely notice of appeal was filed. Petitioner is currently serving his sentence in the custody of the Bureau of Prisons.

The Second Circuit Court of Appeals Decision

On September 16, 1997, the Second Circuit Court of Appeals upheld petitioner's conviction and, in a majority opinion, held that the court's instruction on conditional intent was correct.

The circuit court found that the concept of conditional intent to harm is included within the definition of specific intent. Notwithstanding the absence of any precedent in federal law, the majority relied on state law and the Model Penal Code (which has never been adopted by

the federal courts) as support for finding conditional intent to be included within the concept of specific intent.

Finally, although the majority stated that it was not attempting to rewrite a poorly drafted statute, the court wrote, "Furthermore, and most importantly, incorporating conditional intent within the specific intent language of the statute comports with the reasonable interpretation of the legislative purpose of the statute." J.A. 63.

In a carefully worded dissenting opinion, Judge Miner found no basis in the plain language of the statute or in its legislative history to support expanding the mental culpability required for the commission of the crime of carjacking to include conditional intent. J.A. 67-73. Judge Miner reasoned that the language of the statute was clear and unambiguous. Further, Judge Miner found that the Congressional record failed to contain sufficiently persuasive information to support a conclusion that the heightened intent requirement added by the 1994 amendment to the crime was an "unintended drafting error." J.A. 69. Moreover, Judge Miner wrote that even if the heightened intent requirement was an inadvertent legislative mistake, the Supreme Court has long held that "to supply omissions (to a statute) transcends the judicial function." *Id.* (quoting *Iselin v. United States*, 270 U.S. 245, 251 (1926)).

Finally, Judge Miner stressed that there exists no basis in federal law which permits the expansion of specific intent to include the concept of conditional intent. The two are clearly different states of mind. Thus, despite assertions to the contrary, in finding that the carjacking statute encompassed the conditional intent to cause

serious injury or death, the majority effectively redrafted the law.

The opinion and holding of the Second Circuit conflicted with the holding of the Ninth Circuit in *United States v. Randolph*, 93 F.3d 656 (9th Cir. 1996). The Third Circuit in *United States v. Anderson*, 108 F.3d 478 (3d Cir.), *cert. denied*, 118 S. Ct. 123 (1997), and the Tenth Circuit in *United States v. Romero*, 122 F.3d 1334 (10th Cir. 1997), have upheld the concept of conditional intent and applied it to the crime of carjacking. In *United States v. Lake*, 972 F. Supp. 328 (D.V.I. 1997), the district court adopted the concept of conditional intent and in *United States v. Craft*, 1996 U.S. Dist. LEXIS 18964, 1996 WL 745527 (E.D. Pa. Dec. 23, 1996), the district court rejected the theory.

On April 27, 1998, this Court granted certiorari.

Summary of Argument

Petitioner contends that both the Second Circuit Court of Appeals and the Eastern District Court committed reversible error when they interpreted the carjacking statute to encompass a conditional intent to cause serious bodily harm or death. The statute passed by Congress in 1994 expressly added the requirement of an intent to cause serious bodily harm or death as an element of the crime. Petitioner contends that the plain language of the statute must be interpreted in accordance with its terms. Moreover, although neither legislative history or public policy can be relied on to support a different conclusion, both the legislative history and public policy support petitioner's argument.

In addition, petitioner also contends that the concept of conditional intent has no basis in federal criminal law and cannot be applied to petitioner's case. Furthermore, petitioner contends that the instructions provided to the jury on conditional intent were unconstitutionally defective.

Finally, even if the Court were to find some support for the proposition that the carjacking statute encompasses a conditional intent to cause serious bodily harm or death, principles of lenity would require the Court not to enforce such an interpretation against the petitioner.

ARGUMENT

PETITIONER'S CONVICTION MUST BE REVERSED BECAUSE THE REQUIREMENT OF AN INTENT TO CAUSE SERIOUS BODILY HARM OR DEATH CONTAINED IN THE CARJACKING STATUTE CANNOT BE INTERPRETED TO ENCOMPASS CONDITIONAL INTENT

The issue before the Court is whether the express definition of intent contained in a criminal statute can be expanded and replaced by a reduced level of mental culpability. Because such an exercise necessarily requires judicial intervention into the reach of an unequivocally worded statute, it cannot be allowed.

In deciding the meaning and reach of a federal criminal law, a number of irrefutable guidelines have emerged. First and foremost the language of a statute is examined. Thus, in this case where the statute provides that the defendant must possess a specific intent to cause death or serious bodily harm as an element of the offense, there is

no room for debate concerning the mens rea required for conviction.

The ruling of the Second Circuit failed to adhere to this fundamental tenet. Its decision holding that the federal carjacking statute encompasses a conditional intent to cause serious bodily harm or death must be reversed because: (1) the holding patently contravenes the plain and unequivocal language of the carjacking statute; (2) the decision introduces an entirely novel concept of mental culpability into federal criminal law; (3) the legislative history of the carjacking statute provides no support for introducing the concept of conditional intent into the statute; (4) persuasive policy reasons simply do not exist to expand the reach of an essentially unambiguous criminal statute; (5) longstanding principles of lenity require this Court not to construct the statute against petitioner; and (6) the district court erroneously instructed the jury on the concept of conditional intent.

I. The Statutory Language of the Carjacking Statute is Clear and Unequivocal

In 1992, Congress passed the Anti Car Theft Act, Pub. L. No. 102-519, 106 Stat. 3384, which read as follows:

> Whoever, possessing a firearm . . . takes a motor vehicle . . . from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall. . . . (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both. (Codified at 18 U.S.C. § 2119.)

During 1993, an amendment to the statute was adopted by Congress and the statute now reads as follows:

> Whoever, with the intent to cause death or serious bodily harm . . . takes a motor vehicle . . . from the person or the presence of another by force, and violence or by intimidation, or attempts to do so, shall. . . . (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death.[2]

The language of the amended statute is neither complex nor difficult to grasp. Indeed, there is simply no mystery as to the statute. As amended, the statute eliminated the requirement that a weapon be possessed and added the element that the perpetrator have the intent to cause death or serious bodily harm. Although no longer requiring that the perpetrator possess a firearm, the added requirement that the perpetrator possess the intent to cause death or serious bodily harm transformed the statute from a general intent crime into a specific intent offense. *United States v. Randolph*, 93 F.3d 656 (9th Cir. 1996); *United States v. Rivera-Gomez*, 67 F.3d 993 (1st Cir. 1995). In addition, the statute provides for the imposition

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[2] The law was enacted in the following provision of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 1970:

> "(14) CARJACKING – Section 2119(3) of Title 18, United States Code, is amended by striking the period after "both" and inserting, "or sentenced to death"; and by striking, "possessing a firearm as defined in section 921 of this title", and inserting, "with the intent to cause death or serious bodily harm."

of the death penalty where the crime results in the death of a person.

It is beyond cavil that the first canon of statutory construction is "a legislature says in a statute what it means and means in a statute what it says." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Thus, a court has no choice but to apply a statute in accordance with its terms. Indeed, unless a literal reading of a statute would "lead to absurd or futile results" or completely frustrate the obvious Congressional intent, the words of a statute must be taken as the final expression of its purpose. *United States v. American Trucking Ass'ns* 310 U.S. 534, 543 (1940).

Thus, the Court has held that when the words of a statute are unambiguous, this first canon of statutory construction is also the last. *Rubin v. United States*, 449 U.S. 424, 430 (1981). Judicial inquiry is complete when the provisions of a statute and the elements of a crime are readily discernible and easily understood. *Rubin v. United States, supra*. "Unless otherwise defined, [statutory] words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979).

These rules of construction simply leave no room to interpret the amendments to the 1994 carjacking statute in any manner other than their obvious and unequivocal terms. The law contains no omissions or gaps or lack of clarity as to the intent element. Indeed, any attempt to manipulate the language of the statute or to expand upon it can only be viewed as an attempt to alter a law enacted

by Congress to better suit the taste of the presiding tribunal. *Caminetti v. United States*, 242 U.S. 470 (1917).

It is also incontestable that the elements of a criminal offense are created by the legislature, particularly in the case of federal crimes, which are solely creatures of statute. *Liparota v. United States*, 471 U.S. 419, 424 (1985); *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812). Thus, when Congress has expressly defined the mental state required for the commission of a crime, the statute must be interpreted in accordance with its unequivocal language. *Cf. Liparota v. United States*, 471 U.S. at 424.

In all cases where the Court has grappled with the mens rea required by a criminal statute, the rule of first priority has always been that federal crimes are defined by Congress. Therefore, as long as Congress acts within its constitutional power, the Court "must give effect to Congress' expressed intention concerning the scope of conduct prohibited." *United States v. Kozminski*, 487 U.S. 931, 939 (1988); *see also Dowling v. United States*, 473 U.S. 207, 213-14 (1985); *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). The courts "should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute." *Morissette v. United States*, 342 U.S. 246, 263 (1952).

In determining the issue of mental culpability, the Court has never expanded the concept of intent beyond the clear language of the statute. Accordingly, while the Court has required a higher level of mens rea than the language of the law expressly required, the Court has never required a lower level of mens rea than required by

a statute. *Staples v. United States*, 511 U.S. 600 (1994); *Cheeks v. United States*, 498 U.S. 192 (1991); *Liparota v. United States*, 471 U.S. 419 (1985); *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978); *Morissette v. United States*, 342 U.S. 246 (1952).

In holding that government has the burden of proving intent, notwithstanding the absence of an express mens rea element in the statute, the Court has consistently stressed that "Congress will be presumed to have legislated against the background of our traditional legal concepts which render intent a critical factor, and 'absence of contrary direction will be taken as satisfaction with widely accepted definitions, not as a departure from them.' " *United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978) (quoting *Morissette v. United States*, 342 U.S. 246, 263-(1952)).

In petitioner's case, the amended statute expressly provides (rather than omits) a standard of mens rea which has a widely accepted application in federal criminal law. The government attempts to minimize this clear expression of Congressional will by advocating the creation of a conditional concept of mens rea. But conditional intent is not contained in the language of the statute, is a novel standard of mens rea in federal law and has no basis in the precedents established by the Court.

In ruling on the meaning of the intent element within federal criminal statutes, the Court has never recognized the concept of conditional intent. Indeed, both general and specific intent are clearly recognized as the state of mind actually possessed by the perpetrator at the time of

commission of the crime. Intent, whether general or specific, is never defined as a possible state of mind which could emerge in the future upon the existence of a conditional state of affairs. Consequently, the Court has always defined intent in an unconditional manner. *United States v. Bailey*, 444 U.S. 394 (1980); *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978).

In sum, there is no precedent of the Court in which the expressly stated and traditionally understood mens rea language contained in a statute has been expanded to include the novel concept of conditional intent. The element of specific intent contained in the carjacking statute articulates a state of mind which could not be more clearly and unambiguously set forth. A specific intent to cause serious bodily harm thus speaks for itself and allows only for the single interpretation that serious bodily harm or death is the conscious intention and design of the perpetrator. By refusing to adhere to the language of the statute and introducing a novel conditional intent standard of culpability, the district court committed error which requires the reversal of petitioner's conviction.

II. The Legislative History Does not Support the Court's Interpretation of the Statute

The language of the carjacking statute is unequivocal. Therefore, the legislative history of the statute need not be evaluated, as there is no confusion as to its meaning. *Ratzlaf v. United States*, 510 U.S. 135, 148 (1994) ("we do not resort to legislative history to cloud a statutory text that is clear"). Furthermore, if it is necessary to resort to

legislative history to interpret a statute, that interpretation should err in favor of the defendant. As the Court said in *Hughey v. United States*, 495 U.S. 411, 422 (1990), "longstanding principles of lenity, which demand resolution of ambiguities in criminal statutes in favor of the defendant, preclude our resolution of the ambiguity against petitioner on the basis of general declarations of policy in the statute and legislative history." (Internal citations omitted). Although the Court should not use the legislative history to resolve any "ambiguity against (the) petitioner," in this case the scant legislative history fully supports petitioner.

As there was no textual support for the lower court's ruling that conditional intent satisfied the intent element of the statute, the court was reduced to quoting legislative history to support its erroneous holding. In particular, the lower court quoted Sen. Lieberman who said, "We need to broaden (the Carjacking) law that we adopted last year to cover all carjackings, not simply armed carjackings, and to provide prosecutors with the option of seeking the death penalty if an innocent person dies." 139 Cong. Rec. S5821 (daily ed. May 12, 1993). But these remarks were made on behalf of a *different* crime bill, S. 942, which was introduced a year earlier than the one at issue in this case. Not only did that bill have no language regarding intent, but it *was never passed* by either House of Congress. Therefore, the comments of Sen. Lieberman are *totally irrelevant* to the Congressional intent behind the specific intent element embodied in the enacted carjacking statute. Similarly, Representative Franks' comment that the crime bill "will make an additional 22

crimes including carjacking and drive-by shootings, subject to the death penalty," 140 Cong. Rec E858 (daily ed. May 5, 1994), also provides no support for the lower court's holding regarding conditional intent, because the intent element had not yet been added to the statute.

Although this Court cannot use the comments of legislators speaking about bills that were never passed as guidance for Congress' intent, it can use the language of the bills that the individual houses passed as some guidance. Neither the Senate version of the crime bill (S. 1607), nor the House version of the crime bill (H.R. 3555) contained the intent element. Rather the intent element was added after the House and Senate met to reconcile their differences regarding the crime bill. The first mention of the intent language was in the committee report which stated that the Senate agrees to "the addition of an intent standard for carjacking." H.R. Rep. No. 103-694, at 418 (1994).

Because this report came out of committee, a written record of any debate which led to its introduction does not exist. The fact that the language encompassing a heightened intent requirement was utilized instead of the proposed Senate bill which contained no language concerning intent, however, can only be interpreted to mean that a narrowing of the scope of the initially proposed amended law was desired by Congress.

Although it is clear that Congress meant to add a heightened intent standard to the carjacking statute, the Second Circuit believed that Congress mistakenly added the intent requirement to non-death penalty cases

because the amendment to the carjacking statute begins by stating that "Subsection (3) of Section 2119(3) of title 18 (the punitive provision of the statute providing for the death penalty) is amended." 108 Stat. at 1970. But the Second Circuit noted that Congress actually added the intent element and withdrawal of the firearms requirement to the main text of the statute and not "Subsection (3)." J.A. 58.

This curious fact, however, lends no support for metamorphisizing the concept of specific intent into conditional intent. Although the Second Circuit correctly noted that it should "decline(s) any invitation to redraft the statute – that is a task better left to the legislature," *id.*, it then did precisely that by redrafting the statute to include conditional intent.

Moreover, if the Second Circuit was correct that Congress' purpose was to only add a specific intent requirement to the death penalty section of the statute then the circuit court's utilization of conditional intent as a proxy for specific intent is patently illogical. It is preposterous to presume that Congress would introduce the concept of conditional intent into death penalty legislation without: (a) supplying any statutory language to that effect; (b) having any discussion taking place as to its existence; or (c) having any dialogue or debate regarding the constitutionality of permitting such a state of mind to be used as the basis for the execution of a defendant.

In sum, there is simply nothing in the legislative history of the amended carjacking statute which provides any support for expanding the law by changing the intent requirement to include conditional intent. Therefore, the

decision of the Second Circuit and the district court to alter and revise the meaning and language of the statute cannot be sustained.

III. Persuasive Policy Reasons Do Not Exist to Expand the Expressly Stated Mens Rea Requirement of the Statute

There are compelling policy reasons for concluding that in adding the heightened intent requirement to the main text of the carjacking statute, Congress intended to impose a significant limitation on the scope of the law. The elimination of the firearm element of the carjacking statute would have broadened federal jurisdiction to all 35,000 carjackings occurring each year if some additional limitation was not placed on the elements of the offense. In light of the concerns of Senator Biden and other legislators that the elimination of the firearm requirement was further diluting the already attenuated federal nexus of this traditional state crime, the addition of the requirement that the perpetrator intend to cause serious physical injury or death as part of the statutory definition of the offense advances important federalism principles. 139 Cong. Rec. S15,302 (daily ed. Nov. 8, 1993) (statement of Sen. Biden); *see also* 139 Cong. Rec. S15,524-26 (daily ed. Nov. 10, 1993) (statement of Sen. Leahy); *see also* 140 Cong. Rec. H2325-26 (daily ed. Apr. 14, 1994) (statement of Rep. Scott).

Although as previously noted, Senator Lieberman and Representative Franks made statements during the legislative process in support of legislation which would

have amended the carjacking statute in a virtually unlimited manner, the remarks of the legislators did not address the heightened intent statute which was ultimately enacted into law. Thus, it can hardly be argued that the public policy goals underlying the statute are best served by stretching the statute to federalize all carjackings.

Congress has never enacted a criminal statute containing an express or implied conditional intent provision. It is only when a defendant contemplates conduct in the future that his purposes can be conditional because the purposes that accompany a completed criminal act, however conditional they once were, become unconditional at the point of the crime's commission. Thus, whatever a carjacker's purposes and intentions might have been had his crime been resisted, it is only the purpose and intent he possessed when the act was actually committed which is at issue in determining his culpability for the completed crime.[3]

In a completed crime, any conditionality of a defendant's original purpose is immaterial because those purposes have become either unconditional or non-existent upon the commission of the crime. Any intention he would have possessed if other conditions were present, at

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[3] Petitioner was convicted of carjacking notwithstanding the complete absence of proof that he ever intended to cause serious bodily harm to anyone when he and his accomplice forcibly obtained their vehicles. Indeed, the proof at trial established that the defendant's true desire and purpose in perpetrating the crimes which they actually committed was to obtain the vehicles they acquired without having to harm their victims. J.A. 36.

best, can only be a subject of prosecution in the case of an inchoate crime, such as solicitation or an incomplete attempt. Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. Crim. L & Criminology 1138 (1997).

The government in its opposition to the petition for certiorari argued that a conditional intent should apply, however, to the particular crime of carjacking because of the statute's prohibition against taking a vehicle "by force and violence or by intimidation." The government contends that because it would be difficult to prove such an unconditional intent in any case in which the carjacker did not in fact do violence to the victim, petitioner's argument would essentially read the phrase "or by intimidation" out of the statute.

The government's argument misconstrues the logical and straight-forward statute which Congress chose to enact. The intent to cause serious bodily harm or death defines the state of mind which a defendant must possess while taking a victim's vehicle. The taking of the vehicle by force and violence or by intimidation quite obviously describes the conduct which the statute prohibits. It is simply incorrect to contend that requiring the government to prove that a perpetrator possessed the specific intent to cause serious bodily harm or death at the time of the taking of the vehicle reads intimidation out of the statute. For example, a defendant who fires a shot at the driver of a vehicle and misses and who consequently succeeds in taking the vehicle by virtue of the intimidating impact of such behavior has certainly manifested an intent to cause serious bodily harm. Likewise, a perpetrator who threatens a driver in order to take the driver's

car and then shoots the driver after obtaining the car has taken the vehicle by intimidation as well as exhibiting a specific intent to cause serious bodily harm and will be liable under the statute.

In short, the government's argument implicitly rests on the specious premise that the infliction of actual injury constitutes the only evidentiary basis upon which a jury could find a specific intent to cause serious bodily harm. Rather than constituting the only evidence of an intent to cause serious harm, although probative, actual injury merely represents one of several potential pieces of evidence which are probative of the perpetrator's intent.

The government's argument that conditional intent is necessary because the statute includes acts of intimidation is therefore untenable. The contention that intimidation can only encompass conditional intent is simply flawed.

If the decision of the Second Circuit is affirmed and conditional intent is accepted as a proxy for a specific intent to cause death or serious bodily harm then, in effect, the federal carjacking statute has been made coextensive with analogous state statutes. But making federal carjacking statutes coextensive with existing state law statutes contravenes the expressed Congressional desire to impose some limitation on the intervention of the federal courts into traditional state law crimes.

Interpreting the statute to require a showing of a specific intent to seriously harm a person would confine the law to those persons who set out to take a vehicle

from their victims with a specific intent of harming their victims. The only individuals who would escape prosecution under the federal law would be those offenders who had no intention of harming anyone and only desired to steal an automobile. Any criminal who intends to seriously injure his victim is within the reach of the statute. On the other hand, the carjacker who only intended to seize a vehicle without harming the victim of the crime could still, of course, be prosecuted in state court.

If conditional intent is accepted, however, particularly in light of the elimination of the firearm requirement of the offense, the only carjacking which would not be subject to federal prosecution would be the situation where a carjacker could show that even if the victim had resisted the perpetrator, the perpetrator would not have inflicted any harm. Because such a scenario could only realistically be shown to exist if the victim resisted and the carjacker decided not to commit his crime, conditional intent would essentially read the specific intent to cause serious bodily harm right out of the statute.

In sum, it is far more consistent with both the purpose of the statute and public policy to interpret the amended carjacking statute as a law which was enacted to permit federal intervention only into those carjackings, armed and unarmed, where the perpetrator possessed an actual intent to cause serious bodily harm or death. The heightened intent requirement properly confines carjackers who did not intend to inflict serious injury on their victims to the jurisdiction of the state courts. Thus, in addition to the language and legislative history of the statute, the interests of public policy and the principles of

federalism are best served by refusing to distort the scope of the law.

IV. The District Court Erroneously Instructed The Jury on The Elements of the Concept of Conditional Intent

The Second Circuit cited the Model Penal Code for its contention that conditional intent satisfied the intent element of the carjacking statute. But the Model Penal Code also addresses the need for the prosecution to establish the defendant's awareness of the circumstances which trigger his conditional intent or his hope that such circumstances will exist. The district court did not, however, require the prosecution to establish the defendant's awareness.

The Model Penal Code states that:

> A person acts purposely with respect to a material element of an offense when:
>
> 1) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
>
> 2) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or believes or hopes that they exist.

Model Penal Code § 2.01(2)(a).

Thus, under this definition, in addition to the object or result of a defendant's conduct, the Model Penal Code also requires as an element of acting purposely that the

prosecution prove knowledge of the existence of the circumstances underlying the crime. In addition, Model Penal Code 2.02(7) provides that "when knowledge of the existence of a particular fact is an element of the offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist." *See United States v. Dworken*, 855 F.2d 12, 18-19 (1st Cir. 1988) (holding that liability under a conditional intent theory would only attach if a defendant "reasonably believed" that the conditions would obtain).

In petitioner's case, the district court claimed that it was following the Model Penal Code but failed to address the issue of knowledge and belief regarding whether resistance would be encountered in the course of the carjacking.

Thus, the jury was never charged on the question of whether petitioner had even a reasonable belief that in carrying out the charged carjackings he would be met by such resistance that he would have to resort to inflicting serious bodily harm or death upon one of his victims. Consequently, even in the event this Court accepts the government's theory of conditional intent, the trial court's failure to charge the jury on the issue of the defendant's belief as to the existence of the conditions which was the prerequisite for his intent to cause serious bodily harm requires the reversal of petitioner's conviction. *See also* Paul A. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond* 35 Stan. L. Rev. 681 (1983).

In addition, the issue of the defendant's awareness of the existence of the conditions which trigger the conditional intent is a two part objective/subjective test. As a threshold issue, the government must establish that there is a high probability *i.e.* a reasonable belief that the defendant's offense will be met by resistance. *United States v. Dworken*, 855 F.2d 12 (1st Cir. 1988). Once this is proven, the prosecution still has the burden of proving that the defendant subjectively believed that resistance is likely. Since the probability of the conditions are an essential element of the defendant's mens rea, his subjective belief is certainly at issue. *Cf., Arave v. Creech*, 507 U.S. 463, 473 (1993); *see also People v. Goetz*, 497 N.E.2d 41 (N.Y. 1986) (the words "reasonably believe" embody elements which are subjective (i.e., what the actor believes) as well as objective (i.e., whether a reasonable person could have had these beliefs)).

The district court's charge to the jury was thus flawed in two essential respects. First, the court failed to charge the jury that the government was required to prove beyond a reasonable doubt that, viewed objectively, there was a probability of resistance. Second, the court also failed to instruct the jury on the government's burden to prove beyond a reasonable doubt that petitioner subjectively believed in the high probability of his conduct being met by resistance which would elicit his otherwise dormant intent to cause serious bodily harm. Therefore, the court's defective instructions requires the reversal of petitioner's conviction. *In re Winship*, 397 U.S. 358, 364 (1970).

In sum, the district court failed to comprehensively develop the guidelines and essential principles of the

theory of conditional intent and failed to properly instruct the jury on this novel concept. Thus, the jury could not properly apply conditional intent to the facts of the case. Thus, even if the total absence of conditional intent from the language of the statute is somehow overlooked, the district court's failure to provide the jury with essential tools to enable them to meaningfully apply the concept requires the reversal of petitioner's conviction.

V. Fundamental Principles of Lenity Require that the Statute be Applied in Accordance with its Express Language

Even if this Court were to reject all of petitioner's arguments concerning the completely unambiguous language and meaning of the carjacking statute, the legislative history which clearly supports the petitioner's arguments and the public policy reasons why the Court should not adopt conditional intent, the rule of lenity would still require the Court to reverse petitioner's conviction.

The government, by proposing a concept of mens rea which has never previously existed in federal criminal law and arguing that a specific intent to cause serious bodily harm instead means a conditional intent to cause such injury, has at best created ambiguity in the statute. Because "[t]he Court has emphasized that the touchstone of lenity is statutory ambiguity," *Bifulco v. United States*, 447 U.S. 381, 387 (1980) (internal quotation omitted); and that once a statutory ambiguity is shown "that conclusion should end the matter," *United States v. R.L.C.*, 503 U.S. 291, 307 (1992) (Scalia, J., concurring); the government's expansive interpretation of the carjacking statute cannot be permitted to stand.

Moreover, if the legislature wishes to impose a level of culpability which goes beyond a specific intent to cause serious harm than the Court should leave it to Congress to speak "in language that is clear and definite." *United States v. Bass*, 404 U.S. 336, 347 (1971) (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222 (1952)).

Finally, "longstanding principles of lenity, which demand resolution of ambiguities in criminal statutes in favor of the defendant . . . preclude [the Court's] resolution of the ambiguity against petitioner on the basis of general declarations of policy in the statute and legislative history." *Hughey v. United States*, 495 U.S. 411, 421 (1990) (internal citation omitted). Therefore, the Court should reverse petitioner's conviction.

CONCLUSION

The language of the amended carjacking statute, its legislative history, longstanding concepts of federal criminal jurisprudence, public policy, and principles of lenity all lead to the same result. The intent to cause death or serious bodily harm element of the amended carjacking statute requires the government to prove beyond a reasonable doubt that a defendant possesses an intent to cause death or serious bodily harm. The government's failure to present such proof and the district court's decision not to instruct the jury regarding such a requirement

compels the reversal of petitioner's convictions of all carjacking and § 924(c) counts.

Respectfully submitted,

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July 2, 1998

No. 97-7164

In the Supreme Court of the United States

OCTOBER TERM, 1997

FRANCOIS HOLLOWAY, AKA ABDU ALI, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a defendant acted "with the intent to cause death or serious bodily harm" for purposes of the federal carjacking statute, 18 U.S.C. 2119, where he intended to cause death or serious harm if it proved necessary to do so in order to steal the victim's car.

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 48-73) is reported at 126 F.3d 82. The opinion of the district court (J.A. 32-47) is reported at 921 F. Supp. 155.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1997. The petition for a writ of certiorari was filed on December 12, 1997, and granted on April 27, 1998. J.A. 74. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

At the time of petitioner's offenses, 18 U.S.C. 2119 (1994) provided as follows:

§ 2119. Motor Vehicles

Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall —

(1) be fined under this title or imprisoned not more than 15 years, or both,

(2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and

(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death.[1]

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[1] Unless otherwise noted, references to Section 2119 in this brief are to this version of the statute. The question whether clauses (2) and (3) of the pre-1994 version of Section 2119 (see note 14, *infra*) specify sentencing factors or define additional elements of separate, aggravated carjacking offenses is before this Court in *Jones* v. *United States*, No. 97-6203 (argument scheduled for Oct. 5, 1998). In 1996, Congress amended Section 2119 to specify that the term "serious bodily injury" in subsection (2) includes certain sexual assaults. Carjacking Correction Act of 1996, Pub. L. No. 104-217, § 2, 110 Stat. 3020.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiracy to operate a "chop shop" in violation of 18 U.S.C. 371; operating a chop shop, in violation of 18 U.S.C. 2322; three counts of carjacking, in violation of 18 U.S.C. 2119; and three counts of using a firearm during and in relation to the commission of a crime of violence, in violation of 18 U.S.C. 924(c). He was sentenced to concurrent prison terms of 60 months for conspiracy, 151 months for operation of the chop shop, and 151 months for each count of carjacking; a consecutive term of five years' imprisonment on the first firearms count; and two additional consecutive 20-year terms on the two remaining firearms counts. The district court also imposed a five-year term of supervised release. The court of appeals affirmed.

1. In September 1994, Teddy Arnold recruited his son, Vernon Lennon, to steal cars to be taken to a Queens, New York, "chop shop" for dismantling. Lennon, in turn, recruited petitioner and David Valentine to assist him. The three agreed that they should use a firearm during their thefts, and Lennon showed the others a .32 caliber revolver for that purpose. J.A. 50.

On October 14, 1994, petitioner and Lennon followed a 1992 Nissan Maxima driven by 69-year-old Stanley Metzger. When Metzger stopped and parked across from his residence, Lennon approached, pointed his revolver at Metzger, and demanded Metzger's car keys. Metzger first gave Lennon his house keys, but Lennon demanded the car keys, telling Metzger "I have a gun. I am going to shoot." Metzger then surrendered his keys and his money, and Lennon drove away in the Maxima. J.A. 50-51.

The following day, Lennon and petitioner followed a 1991 Toyota Celica driven by Donna DiFranco. When DiFranco parked, Lennon approached her, pointed his gun at her, and demanded her money and car keys. After DiFranco disengaged the car alarm and unlocked the "club" device that secured the steering wheel, Lennon drove off in her car. J.A. 51.

That same day, Lennon and petitioner followed a 1988 Mercedes-Benz driven by Ruben Rodriguez until Rodriguez parked near his home. As Lennon and petitioner approached him, Rodriguez retreated to his car. Lennon produced his gun and threatened: "Get out of the car or I'll shoot." Rodriguez complied, and Lennon demanded his money and car keys. When Rodriguez hesitated, petitioner punched him in the face. Rodriguez surrendered the items and fled on foot. Lennon drove off in the Mercedes, and petitioner followed in another car. J.A. 51.[2]

Lennon pleaded guilty to several carjacking and robbery charges and testified as a government witness at trial. Lennon testified that his plan was to steal cars without harming the victims, but that he would have used the gun if any of the victims had resisted or given him "a hard time." J.A. 52.

Petitioner was charged with conspiracy to operate and operation of a "chop shop," three counts of carjacking, and three counts of using a firearm during and in relation to a crime of violence. See page 3, *supra*. With respect to carjacking, the district court instructed the jury that in order to find petitioner guilty it must find that his "intent in committing the crime [was] to cause death or serious bodily harm."

[2] At trial, the government also presented evidence of two additional, uncharged carjackings, one successful and one foiled by an off-duty police officer. J.A. 51-52.

J.A. 19; see J.A. 18-21, 27-31. Over the objection of defense counsel, the court also instructed the jury that, under a theory of "conditional" intent, it could find petitioner guilty if it found that he "intended to cause death or serious bodily harm if the alleged victims had refused to turn over their cars." J.A. 20-21, 30-31.

2. The court of appeals affirmed. J.A. 48-73. With respect to the district court's "conditional intent" instruction, the court first reviewed the history of 18 U.S.C. 2119. J.A. 54-59. It noted that before 1994, Section 2119 required proof that the defendant possessed a firearm in connection with a carjacking, but imposed no explicit intent requirement. In 1994, Congress amended the statute to authorize imposition of the death penalty if a carjacking resulted in death, and to replace the phrase "possessing a firearm" with the present language requiring an "intent to cause death or serious bodily harm." The court observed that the new "intent" language was inserted late in the legislative process, without recorded explanation. The court nonetheless thought it "clear from * * * the legislative history that Congress intended to broaden the coverage of the federal carjacking statute," and it speculated that application of the new intent requirement to cases not involving the death of a victim "was, in all likelihood, an unintended drafting error." J.A. 57. The court "decline[d]," however, "any invitation to redraft the statute," and instead considered whether the new intent element could be satisfied by proof of "conditional" intent—that is, an intent to kill or harm a victim *if* it proved necessary to do so in order to complete the carjacking. J.A. 58-59.

The court rejected (J.A. 60-61) petitioner's argument that "conditional" intent involved "no more than

a state of mind where death is a foreseeable event." In the court's view, "conditional intent requires a much more culpable mental state," because "[a] carjacker who plans to kill or use deadly force on a victim in the event that his victim fails to comply with his demands has engaged in willful and deliberate consideration of his actions." J.A. 60. Under those circumstances, the court explained, "death is more than merely foreseeable, it is fully contemplated and planned for." *Ibid.*

The court observed that "the inclusion of a conditional intent to harm within the definition of specific intent to harm is a well-established principle of criminal common law" (J.A. 62), supported by state statutory and case law, academic commentary, and the Model Penal Code (see J.A. 62-64). "Furthermore, and most importantly," the court concluded that "incorporating conditional intent within the specific intent language of the carjacking statute comports with a reasonable interpretation of the legislative purpose of the statute." J.A. 63. Rejecting an interpretation that "would have the federal carjacking statute covering only those carjackings in which the carjacker's sole and unconditional purpose at the time he committed the carjacking was to kill or maim the victim," the court held instead that "an intent to kill or cause serious bodily harm conditioned on whether the victim relinquishes his or her car is sufficient to fulfill the intent requirement set forth in the federal carjacking statute." J.A. 63-64.

Judge Miner dissented. J.A. 67-73. In his view, there was "no basis in the plain language of [Section 2119] or in the legislative history for an element of conditional intent." J.A. 67. Rather, Judge Miner concluded that "[t]he intent required is spelled out explicitly in the statute," and that any interpretation of that requirement informed by common-law principles lay beyond the power of courts applying federal criminal law. J.A. 73. He would therefore have reversed petitioner's convictions and remanded for retrial. *Ibid.*

SUMMARY OF ARGUMENT

The federal statute that prohibits carjacking, 18 U.S.C. 2119, requires that the defendant have acted "with the intent to cause death or serious bodily harm." That intent requirement is satisfied if the government proves, beyond a reasonable doubt, that a carjacker intended to cause death or serious bodily harm if, but only if, it proved necessary to do so in order to complete the theft of the victim's car.

Petitioner argues principally (Br. 13-19) that the phrase "with the intent to cause death or serious bodily harm" in Section 2119 must be read to require proof that, at some point before or during commission of the offense, the carjacker formed a fixed and unconditional intention to kill or wound the victim. That contention is incorrect, because it ignores background principles that guide construction of the intent elements of analogous crimes. The criminal law has long recognized and punished offenses in which, as in carjacking under the amended Section 2119, a particular intention (here, to cause serious harm or death) is essential, but its implementation (here, actually causing harm or death) is not. In such cases, courts and commentators have recognized that the requisite intent may be conditional. Although there are limited circumstances in which the conditionality of an intention would traditionally preclude criminal liability, no such exception would apply to a carjacker who intends to cause death or injury if necessary to obtain the victim's car. Thus, construing the language of Section 2119 in light of traditional

legal concepts and widely accepted criminal-law definitions, a conditional intent to harm satisfies the intent element of the statute.

Consideration of the text of Section 2119 as a whole confirms that interpretation. In specifying the manner in which a carjacking could be committed, Congress included "intimidation" as an alternative to "force and violence." Petitioner's contention that the intent to cause death or injury must always be entirely unconditional would, however, make the group of cases in which the crime was committed "by intimidation" implausibly small. Similarly, the structure of Section 2119's penalty provisions makes clear that Congress anticipated that in a significant number of cases—indeed, in the basic or ordinary case—the offender would act with the required "intent to cause death or serious bodily harm," but no such harm would "result." That category would most naturally include cases in which the defendant was prepared to inflict physical harm if necessary, but was able to steal the victim's car without doing so.

Thus, the clear implications of the statutory text, which would be anomalous under petitioner's absolute interpretation of the intent requirement, are consistent with a construction of the statute under which intent to harm may be conditional. Moreover, such a construction, while giving Section 2119 the full scope an ordinary reader would expect, nonetheless confines the application of federal criminal sanctions to those cases that present the most serious risk of bodily harm.

Finally, petitioner relies on the rule of lenity. Br. 31-32. A case like this one, in which the offense conduct at issue is plainly criminal and highly blameworthy (whether or not petitioner's intent to harm was unconditional), lies far from the central

concerns of that rule. In any event, the rule of lenity applies only where the intended application of a criminal statute remains ambiguous after every effort has been made to construe it. In this case, application of ordinary principles of statutory construction leaves no doubt about the proper interpretation of Section 2119's intent requirement.

ARGUMENT

A DEFENDANT COMMITS A CARJACKING "WITH THE INTENT TO CAUSE DEATH OR SERIOUS BODILY HARM" WHERE HE INTENDS TO INFLICT SUCH HARM IF IT PROVES NECESSARY TO DO SO IN ORDER TO STEAL THE VICTIM'S CAR

As originally enacted, 18 U.S.C. 2119 specified, as an element of the new federal carjacking offense, that the offender must have "possess[ed] a firearm" while committing the offense. 18 U.S.C. 2119 (Supp. IV 1992). In 1994, as part of the Violent Crime Control and Law Enforcement Act, Congress replaced Section 2119's "possessing a firearm" element with a requirement that the offender have acted "with the intent to cause death or serious bodily harm." 18 U.S.C. 2119 (1994). That requirement is satisfied if the government proves, beyond a reasonable doubt, that a carjacker intended to cause death or serious harm if, but only if, it proved necessary to do so in order to complete the theft of the victim's car.

A. The Intent Requirement Of Section 2119 Should Be Construed In Light Of The Traditional Recognition Of Conditional Intent To Harm As Sufficient To Support Conviction For Crimes Analogous To Carjacking

Petitioner argues principally (Br. 13-19) that the phrase "with the intent to cause death or serious

bodily harm" in Section 2119 must be read to require that, at some point before or during commission of the offense, the carjacker formed a fixed and unconditional intention to kill or wound the victim, whether or not it was necessary to do so in order to obtain the victim's car. While that mental state would plainly satisfy the statutory requirement, the argument that *only* such an unconditional intent will suffice is unsound.

Section 2119 does not state that it is an element of the carjacking offense that the carjacker "intentionally cause death or serious bodily harm." Language to that effect might be read to require the government to prove both that the stated harm was caused and that the offender had at some point conceived a fixed purpose to cause it. The same would generally be true of the intent element of a first-degree murder statute, or of any other crime where the intent in question is an intention to bring about some result (such as death) that is itself an element of the crime. In such a case, the result in question must in fact have been caused in order for there to be a prosecution in the first place, and the additional question posed by an intent requirement is normally whether it was caused purposefully, rather than accidentally or recklessly. If it can be shown that the defendant acted purposefully and that the intended result was, in fact, caused, there is little point in inquiring further whether that purpose was always a firm one, or was at any previous point "conditional."

The analysis is different, however, for a statute like Section 2119, which requires an intent to cause a result, the actual occurrence of which is *not* an element of the offense. There is no question that the government, to establish a carjacking charge, must prove that a defendant acted with the "intent to

cause" death or harm. Equally clearly, however, there is no requirement that death or harm have actually resulted in order for the carjacking offense to be complete.[3] The substantive harm that must result is, instead, the taking of a motor vehicle, by force and violence or by intimidation, from the person or presence of the victim.

The absence of an identity, in a statute of this type, between what the government must prove the defendant intended and what it must prove actually occurred is highly relevant to the character of the intent that must be shown. It will always be sufficient to prove an unconditional intent to bring about the specified result (here, bodily harm), wholly apart from and in addition to any result that must be proved as an element of the offense (here, the theft of the victim's car). The question that arises is whether it is also sufficient to show that the defendant, although not independently intent on causing physical harm, did intend to cause it *if* it proved necessary to do so in order to achieve his primary criminal objective of stealing the victim's car.

Fortunately, that question is not unique or novel. The criminal law has long recognized and punished offenses in which a particular intention is essential, but its implementation is not; and in such cases,

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[3] This would remain true even if the Court were to conclude in *Jones* v. *United States*, No. 97-6203, that the government must plead and prove resulting serious bodily harm or death in order to impose the enhanced penalties authorized by clauses (2) and (3) of Section 2119. There would be no such requirement in cases like this one, in which the pleading and proof encompass all of the elements set out in the initial paragraph of Section 2119, and the punishment imposed does not exceed that authorized by the first (unenhanced) penalty clause.

courts and commentators have recognized that the requisite intent may be conditional. Thus, for example, in one leading case, the defendants brandished guns at members of a rival labor union, telling them that if they did not stop work and take off their overalls, the defendants would "fill [them] full of holes." *People* v. *Connors*, 97 N.E. 643, 644-645 (Ill. 1912). The workers complied with the demand, and there was no shooting. *Id.* at 645. In upholding the defendants' convictions for assault with intent to murder, the Supreme Court of Illinois agreed that, in such a prosecution, "the specific intent charged is the gist of the offense, and must be proven as charged in the indictment"; but it rejected the defendants' contention "that the intent to commit the crime charged must be absolute and unconditional." *Ibid.*

The court approved, instead, the trial court's instruction to the jury that:

> though you must find that there was a specific intent to kill the prosecuting witness, * * * still, if you believe from the evidence beyond a reasonable doubt that the intention of the defendants was only in the alternative * * * and the shooting * * * was only prevented by the happening of the alternative—that is, the compliance of the [victim] with the demand that he take off his overalls and quit work—then the requirement of the law as to the specific intent is met.

97 N.E.2d at 645. As the court explained, where "the assailant suspends the execution of his purpose merely to give his victim a chance to comply with an unlawful demand, the offense is complete even though the commission of the felony is averted by the submission of the assailed party to the unlawful demands made upon him." *Id.* at 648.

Similarly, in *Eby* v. *State*, 290 N.E.2d 89, 91 & n.2 (Ind. Ct. App. 1972), the court construed Indiana's burglary statute in a prosecution for breaking and entering a dwelling "with the intent * * * to do any act of violence or injury to any human being." The court held that, while the defendant's primary "purpose" in entering the dwelling was not clear, it could be inferred from the evidence that he had at least a coexistent intent to offer violence or injury to anyone who surprised and confronted him inside. *Id.* at 92-95. So long as the trier of fact was convinced "that when the defendant broke in he intended to commit violence if the occasion arose," such an "intent to do violence if necessary," while "conditional," was nonetheless sufficiently "specific" to support the burglary conviction. *Id.* at 96-97. Many other cases in the state courts may be cited to the same or similar effect,[4] and

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[4] See, *e.g.*, *People* v. *McMakin*, 8 Cal. 547, 548-549 (1857) (assault with intent to inflict injury; "Where a party puts in a condition which must be at once performed, and which condition he has no right to impose, and his intent is immediately to enforce performance by violence, and he places himself in a position to do so, and proceeds as far as it is *then* necessary for him to go in order to carry out his intention, then it is as much an assault as if he actually struck, or shot, at the other party, and missed him. It would, indeed, be a great defect in the law, if individuals could be held guiltless under such circumstances."); *Monroe* v. *United States*, 598 A.2d 439 (D.C. 1991) (intent to use weapon if necessary); *State* v. *Mathewson*, 472 P.2d 638, 640 & nn. 1-3 (Idaho 1970) (following *McMakin*, *supra*); *People* v. *Bashic*, 137 N.E. 809, 811 (Ill. 1922) ("A threat to kill, unless any other sort of demand is complied with, is an assault with an intent to murder."); *Commonwealth* v. *Richards*, 293 N.E.2d 854, 860 (Mass. 1973) ("[I]t would suffice [in prosecution for assault with intent to commit murder] if the purpose to murder in the mind of the accessory was a conditional or contingent one, a willingness to see the shooting take place should it become necessary to effectuate the robbery or

the federal courts have not hesitated to apply the same principle when they have had occasion to do so.[5]

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make good an escape."); *People* v. *Vandelinder*, 481 N.W.2d 787, 788-789 (Mich. Ct. App. 1992) (conditional intent that wife be murdered if she refused to reconcile satisfied specific intent requirement of solicitation-to-murder offense); *State* v. *Simonson*, 214 N.W.2d 679, 682 (Minn. 1974) ("[O]ne who receives or conceals what he knows to be stolen property with the intent to restore it to the owner only if the owner pays a reward does have the requisite wrongful intent [to deprive the owner of the property]."); *Vanderpool* v. *State*, 211 N.W. 605, 606-607 (Neb. 1926) (assault with intent to inflict great bodily injury); *State* v. *Morgan*, 25 N.C. 186, 189-190, 192-194 (1842) (conditional intent to strike with an axe sufficient to show "present purpose of doing harm" necessary for assault); see also *State* v. *Bond*, 478 S.E.2d 163, 175 (N.C. 1996) ("The fact that defendant did not definitively know that the condition of the victims' 'messing up' would occur does not negate the specific intent defendant had for [a codefendant] to kill the [victims] if it did occur."); *State* v. *Klein*, 547 P.2d 75, 78 (Mont. 1976). Partly or wholly to the contrary, see *McKinnon* v. *United States*, 644 A.2d 438, 442 (D.C.) (holding that conditional intent to assault former girlfriend if she refused to reconcile would support burglary conviction, but distinguishing conditional intent to use weapon if confronted during burglary, which would not), cert. denied, 513 U.S. 1005 (1994); *Carter* v. *State*, 408 N.E.2d 790, 796 n.6 (Ind. Ct. App. 1980) (disagreeing, in dicta, with analysis of "specific intent" in *Eby*, *supra*); *Craddock* v. *State*, 37 So.2d 778 (Miss. 1948); *State* v. *Irwin*, 285 S.E.2d 345, 349 (N.C. Ct. App. 1982) (but see *Morgan*, *supra*); *State* v. *Kinnemore*, 295 N.E.2d 680, 682-683 (Ohio Ct. App. 1972).

[5] See *United States* v. *Richardson*, 27 F. Cas. 798 (C.C.D.C. 1837) (No. 16,155) (when defendant raised club over victim's head and told her he would strike her if she said a word, his language "showed an intent to strike upon her violation of a condition which he had no right to impose"); *United States* v. *Myers*, 27 F. Cas. 43 (C.C.D.C. 1806) (No. 15,845) ("If you say so again, I will knock you down."); *United States* v. *Dworken*, 855 F.2d 12, 18-19 (1st Cir. 1988) (attempt and conspiracy to distribute drugs, on condition that terms of sale could be

Commentators, too, have long recognized the principle of conditional intent. One leading treatise, for example, explains:

> Where a crime is defined so as to require that the defendant have a particular intention in his mind —as larceny requires that he have an intention to deprive the owner permanently of his property, burglary that he have an intention to commit a felony, and assault with intent to kill that he have an intention to kill—the problem arises whether he has the required intention when his intention is conditional. Thus *A* takes and carries away *B*'s property intending to restore it to *B* if *A*'s dying aunt should leave him a fortune. *A* breaks and enters *B*'s house intending to rape Mrs. *B* if he finds her at home alone. *A* points a gun at *B* telling him he will shoot him unless he removes his overalls, and intending to kill *B* if he does not comply. Perhaps *A*'s aunt does actually leave him the fortune; and Mrs. *B* is away from home; and *B* does remove his overalls. In these cases *A* is

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agreed); *United States* v. *Anello*, 765 F.2d 253, 262-263 (1st Cir. 1985) (intent to purchase and distribute marijuana on condition that quality was adequate); *Shaffer* v. *United States*, 308 F.2d 654 (5th Cir. 1962) (conditional intent to do bodily harm in federal assault prosecution under 18 U.S.C. 113), cert. denied, 373 U.S. 939 (1963); *United States* v. *Marks*, 29 M.J. 1, 3 (C.M.A. 1989) (conditional intent to burn, if material proved flammable, sufficient to support conviction for aggravated arson); *United States* v. *Arrellano*, 812 F.2d 1209, 1212 n.2 (9th Cir. 1987) ("[c]onditional intent is still intent"; conditional intent to kill victim if she refused request for money would support conviction for transporting firearm with intent to commit a felony, although conviction at issue could not be sustained because the jury made no finding as to intent).

guilty of larceny, burglary, and assault with intent to kill, respectively.

1 W. Lafave & A. Scott, *Substantive Criminal Law* § 3.5(d), at 312 (1986) (Lafave & Scott). Thus, "[t]he fact that an intent is conditional or qualified, while not without significance, does not exclude it from the 'intent' category. It is a special type of intent rather than some other kind of state of mind." R. Perkins & R. Boyce, *Criminal Law* 835 (3d ed. 1982) (Perkins & Boyce).[6] And the Model Penal Code, in what its

[6] See also J.A. 62-63; Perkins & Boyce 647 ("[The established rule], which seems quite sound, [is] that an assault with intent to murder does not require an unconditional intent to kill. An intent to kill, in the alternative, is nevertheless an intent to kill."); 2 C. Torcia, *Wharton's Criminal Law* § 182 (15th ed. 1994) (assault); 1 J. Bishop, *Bishop on Criminal Law* § 287a (J. Zane & C. Zollmann eds., 9th ed. 1923) (in the chapter "General View of Intent": "The intent need not be absolute and unconditional."); 2 *id.* § 34 (discussing assault); H. Brill, *Cyclopedia of Criminal Law* § 409, at 692 (1922) (assault with intent to murder requires specific intent to kill, but "[i]f [that intent] exists when the assault is committed, the guilt of the defendant is not affected by the fact that he is prevented from carrying out his felonious purpose * * *, or does not carry it out because the person assaulted yields to his unlawful demands."); 2 F. Wharton, *A Treatise on Criminal Law* § 801 (J. Kerr ed., 1912) ("A conditional threat of force may be an assault."); W. Clark & W. Marshall, *A Treatise on the Law of Crimes* § 202, at 278 (H. Lazell ed., 2d ed. 1905) (assault); I. McLean & P. Morrish, *Harris's Criminal Law* 40 (22d ed., London 1973) (discussing "Specific or Ulterior Intent": "Finally, a person intends to do "Y" if his intent is conditional, *i.e.* he intends to do "Y" if certain circumstances arise. So for example, a person is guilty of burglary if he enters a building as a trespasser, intending to steal one particular thing *if it is there*, or to rape a woman if she is there."); G. Williams, *Criminal Law: The General Part* § 23 (2d ed., London 1961) (in the chapter on "Intention and Recklessness": "A conditional intention is capable of ranking as intention for legal purposes." (citing the Model Penal Code)).

drafters considered to be "a statement and rationalization of the present law," restates the principle as follows in Section 2.02, "General Requirements of Culpability":

> (6) *Requirement of Purpose Satisfied if Purpose Is Conditional.* When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense.

Model Penal Code § 2.02(6) & cmt. 8 (Official Draft 1962 & rev. cmts. 1985).

As the Model Penal Code formulation makes clear, there are limited circumstances in which the contingency of an intention may preclude criminal liability, because it "negatives the harm or evil sought to be prevented by the law defining the offense." In the Code commentary's example, an assault "would not be * * * with the intent to rape, if the defendant's purpose was to accomplish the sexual relation only if the mature victim consented"; or, in LaFave & Scott's examples, "*A* will not be guilty of larceny if his intention, when taking and carrying away *B*'s property, is to return it if it proves to be *B*'s property, but to keep it if it turns out to be *A*'s own property. * * * For one to take another's property intending to give it back if he inherits other property involves a condition which does not negative the evil which larceny seeks to prevent; but taking it intending to restore it if it is not his own property does involve a

condition which negatives that evil." Model Penal Code § 2.02, cmt. 8; LaFave & Scott § 3.5(d), at 312-313.

No such exception would apply to a carjacker who intends to cause serious harm or death only if it becomes necessary to do so in order to steal the victim's car. As the district court in this case pointed out (J.A. 45), that condition on the intent to cause harm—relinquishment of the victim's car—not only does not "negative" the harm the statute seeks to prevent, it *is* the harm the statute seeks to prevent. See *United States* v. *Anderson*, 108 F.3d 478, 484 (3d Cir.) ("Whether the harm sought to be prevented by the statute is the theft of cars, the threat to cause death or serious bodily harm in order to obtain another's car, or the causing of death or serious bodily harm, the intervening event of the victim giving up his or her car in order to avoid serious injury in no way negatives the harm sought to be prevented by the statute."), cert. denied, 118 S. Ct. 123 (1997); see also J.A. 62-65; *United States* v. *Williams*, 136 F.3d 547, 551 (8th Cir. 1998); *United States* v. *Romero*, 122 F.3d 1334, 1338 (10th Cir. 1997), cert. denied, 118 S. Ct. 1310 (1998); but see *United States* v. *Randolph*, 93 F.3d 656, 665 & n.6 (9th Cir. 1996) (declining, on other grounds, to hold conditional intent sufficient under Section 2119).[7]

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[7] Petitioner places some reliance (Br. 28-31) on Sections 2.02(2)(a)(ii) and 2.02(7) of the Model Penal Code. The "intent" element in Section 2119 requires a state of mind that the Code would define as "purpose." See Code § 2.02(2)(a), 2.02(6). Petitioner's discussion of Section 2.02(7), which deals only with the different mental state of "knowledge," is therefore inapposite here. Section 2.02(2)(a)(ii), which petitioner also cites, specifies that an offender acts "purposely" with respect to an offense element that "involves the attendant circumstances" of the offense if "he is aware of the[ir] existence * * * or believes or hopes they exist." That provision has no application here, because the "intent" element in Section 2119, whether conditional or not, relates not to the "attendant circumstances" of a carjacking, but to "the nature of [the offender's] conduct or a result thereof." Code § 2.02(2)(a)(i). The relevant parts of Section 2.02 are therefore subsections (2)(a)(i) and (6), not subsection (2)(a)(ii). Subsection (6) is discussed in the text.

Indeed, the traditional conditional-intent principle is naturally suited to the intent element of the carjacking offense defined by Section 2119. If a defendant is prepared to use deadly force to obtain a victim's car, the fact that the victim's accession to his unlawful demand spares him the necessity of doing so scarcely mitigates the culpability of his mental state. The offender's intent is to maim or kill if necessary, and such a firm and present, though conditional, intent fully satisfies the requirements of the statute.[8]

Petitioner himself stresses (Br. 18) this Court's observation that, in interpreting the intent requirements of federal criminal statutes, "Congress will be presumed to have legislated against the background of our traditional legal concepts which render intent a

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[8] The situation in which circumstances make it unnecessary for an offender to carry out a genuine threat is comparable to the situation in which circumstances make it impossible for him to commit an intended crime. In the latter situation, the better view is that the defendant is nonetheless guilty of attempt. "[A]s a matter of policy * * * no reason exists for exonerating the defendant because of facts unknown to him which made it impossible for him to succeed. In [such] instance[s] the defendant's mental state [is] the same as that of a person guilty of the completed crime, and by committing the acts in question he has demonstrated his readiness to carry out his illegal venture. He is therefore deserving of conviction and is just as much in need of restraint and corrective treatment as the defendant who did not meet with the unanticipated events which barred successful completion of the crime." 2 LaFave & Scott § 6.3(a)(2), at 43.

critical factor, and 'absence of contrary direction [will] be taken as satisfaction with widely accepted definitions, not as a departure from them.'" *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 437 (1978); see also, *e.g.*, *United States* v. *Bailey*, 444 U.S. 394, 397 (1980) ("[I]n enacting the Federal Criminal Code Congress legislated in the light of a long history of case law that is frequently relevant in fleshing out the bare bones of a crime that Congress may have proscribed in a single sentence."); *id.* at 402-406 (discussing historical and modern analysis of criminal intent, including Model Penal Code § 2.02). Petitioner is correct that intent to cause death or serious harm is a "critical factor" under the plain language of Section 2119; but the precise nature of that factor must also be construed in light of "traditional legal concepts" and "widely accepted definitions."[9] As we have shown, those traditional concepts and definitions make clear that the intent element of Section 2119 may be satisfied by proof that the defendant intended to cause death or serious bodily harm *if necessary* to obtain the victim's car.[10]

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[9] As cases like *United States Gypsum* and *Bailey*, among many others, make clear, reference to the backdrop of traditional legal principles against which Congress legislates, as an aid in understanding the meaning of terms or phrases used in federal statutes, does not, as the dissenting judge below suggested (J.A. 73), amount to the improper creation of a "federal common law of crimes." See also, *e.g.*, *Evans* v. *United States*, 504 U.S. 255, 259 (1992) ("It is a familiar 'maxim that a statutory term is generally presumed to have its common-law meaning.'"); *Molzof* v. *United States*, 502 U.S. 301, 307-308 (1992); *Kungys* v. *United States*, 485 U.S. 759, 770 (1988); *Morissette* v. *United States*, 342 U.S. 246, 263 (1952).

[10] Compare *State* v. *Morgan*, 25 N.C. at 189-190 ("The act was not only apparently a most dangerous assault, but accompanied with a present purpose to do great bodily harm; and the only declaration, by which its character is attempted to be changed, is, that the assailant was not determined to execute his savage purpose unconditionally and without a moment's delay. He had commenced the attack and raised the deadly weapon and was in the attitude to strike, but suspended the blow, to afford the object of his vengeance an opportunity to buy his safety, by compliance with the defendant's terms. To hold that such an act, under such circumstances, was not an offer of violence—not an attempt to commit violence, would be, we think, to outrage principle and manifest an utter want of that solicitude for the preservation of peace, which characterizes our law, and which should animate its administrators.")

B. Section 2119 As A Whole Is Best Read To Permit Conviction On The Basis Of A Conditional Intent To Harm

The common-law background that we have described raises at least a presumption that the intent requirement in Section 2119 is best read to encompass conditional intent to kill or cause serious bodily harm. Consideration of the remainder of the statutory text confirms that presumption.

Section 2119 criminalizes the taking of a car from a victim, "with the intent to cause death or serious bodily harm," in one of two ways: "by force and violence *or* by intimidation." 18 U.S.C. 2119 (emphasis added). Because it included "intimidation" as an alternative means of committing the crime, Congress must have contemplated a substantial subset of cases in which a carjacker's threats would successfully obviate any need to resort to actual force or violence —but in which the carjacker would, after 1994, nonetheless possess the requisite intent to cause death or serious harm. Yet if the intent requirement could be satisfied, as petitioner contends, only by a fixed and unconditional intent to harm, then the

number of cases in which the crime was committed only "by intimidation"—that is, using only a successful *threat* of violence—would be implausibly small.

Petitioner offers only two examples that he claims might satisfy these conditions (Br. 25-26): An offender who fires at the victim, intending to hit him, but misses, merely frightening him away; and one who successfully obtains the car keys using only a threat, but who then harms or kills the victim before leaving with the car. While both of those scenarios may involve "intimidation," they also involve taking the victim's car "by force and violence."[11] Even if they did not, however, petitioner's interpretation of the statute would be unsatisfactory, because it excludes a wide range of cases that any ordinary English speaker would understand to be covered by the phrase "by intimidation."

Carjacking is a modern analogue to what was once colloquially known as "highway robbery." Surely the modern legislator, responding to that problem, would intend to encompass, under the rubric of "intimida-

[11] In the first case, the offender by hypothesis intended to, and did, use violence; the fact that, through some happenstance, the force employed did not actually touch the victim hardly means that the offender did not commit the offense "by force and violence." In the second case, the offender might choose the sequence of his actions in order, for example, to avoid damaging the car, or to enlist the victim's involuntary assistance in moving the car to an unpopulated area in an effort to escape or delay detection; or he might decide only after initially obtaining possession that he should physically harm the victim in order to discourage or prevent later identification. In none of those circumstances would it make sense to hold that the defendant did not take the car "by force and violence," simply because he had achieved de facto possession before causing physical harm.

tion," the carjacker's contemporary variant on the highwayman's traditional demand: "Your money *or* your life." Cf. *United States* v. *Richardson*, 27 F. Cas. 798 (C.C.D.C. 1837) (No. 16,155). Yet, under petitioner's "unconditional intent" interpretation, federal law would reach only those carjackings in which the offender had a preexisting and essentially independent purpose to harm the victim, quite apart from stealing his car; or those in which an initially conditional intent ultimately crystallized, during the course of the offense, and resulted in the actual or attempted infliction of harm. See Br. 18-19. That is not a plausible result. See, *e.g.*, J.A. 42 (Petitioner's interpretation "would no doubt insulate from federal prosecution the large majority of carjackings, as carjackers generally do not intend to cause death or serious bodily injury, but in fact hope that the opposite will occur, i.e., that the victim will peaceably give up the car and suffer no harm at all.").

The conclusion that Congress could not have intended Section 2119 to apply only in cases that involve an unconditional intent to harm is reenforced by the structure of the Section's penalty provisions. The first penalty clause in Section 2119 authorizes a severe penalty—up to 15 years' imprisonment—for any carjacking. Clauses (2) and (3) then provide for enhanced penalties in cases in which serious bodily harm or death actually "results" from commission of the crime. Congress therefore must have anticipated that in a significant number of cases—indeed, it would seem, in the basic or ordinary case—an offender would act with the required "intent to cause death or serious bodily harm," and yet no such harm would "result[]." Moreover, as we have argued elsewhere, Congress's use of the passive construction "if death [or serious harm] results" in the statute's enhanced

penalty provisions suggests that it intended those provisions to apply even if the resulting death or injury was an incidental result, rather than a planned (or even contemplated) part, of the carjacking offense.[12]

These implications of the statutory text are fully compatible with a construction under which the intent to cause death or harm that the government must prove may be conditional. In the many cases in which a threatening demand suffices to procure the victim's car, the jury will often be able (although not required) to infer that the offender intended to carry out the threat if necessary, and yet no actual bodily harm will "result" from the offense. If bodily harm does result, then the offender will, appropriately, be subject to more severe punishment—whether the particular harm in question is one the offender intended to inflict if necessary, or merely an unintended but proximate result of the offense conduct. Under petitioner's construction of the statute, by contrast, it is difficult to imagine many cases in which the government will be able to prove an unconditional intent to cause serious harm, but in which such harm will not in fact have resulted.

Against all this, petitioner argues (Br. 26-28) that Congress intended Section 2119's intent requirement to limit the scope of the federal carjacking

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[12] See 97-6203 U.S. Br. at 17-18, 27 & n.11 (*Jones* v. *United States*). We have provided petitioner with a copy of our brief in *Jones*. The structural analysis in the text is, of course, independent of the result in *Jones*: Whether or not serious bodily harm or death must be pleaded and proved at trial in order to impose the enhanced sentences authorized by clauses (2) and (3) of Section 2119, Congress obviously viewed those showings as matters of proof in addition to the offense elements set out in the Section's initial paragraph.

prohibition, and that accepting proof of conditional intent would "read the specific intent to cause serious bodily harm right out of the statute." But permitting the government to meet the intent requirement with proof of a conditional intent to harm imposes a significant restriction on the scope of the federal prohibition. Many carjackings could be completed without intending to inflict serious bodily harm, even if the victim attempted to resist. In a case involving no harm, or only harm that was clearly accidental, a jury might well be unwilling to infer the intent required by Section 2119, and the crime would therefore not be covered by federal law.

Indeed, in this case, petitioner's counsel argued at length to the jury that the government had not proven the existence of any intent to cause harm, conditional or otherwise, and certainly had not shown that petitioner (who did not himself carry a gun during the crimes at issue) possessed such an intent. See 12/13/95 Tr. 280-300; *id.* at 280-281 ("We came in here and told you [the jury] from the very beginning what the issue in this case is. And that is whether or not [petitioner] intended to cause death or serious physical injury to any person."). The jury evidently chose to credit the testimony of petitioner's co-conspirator, Vernon Lennon, that he would have used his gun if necessary (see J.A. 36), and to infer from the circumstances—including petitioner's own behavior in punching one victim who hesitated to turn over his car (J.A. 51)—that petitioner shared that intent. That the jury reached that permissible conclusion does not, however, mean that the need to prove petitioner's intent did not impose a substantial limitation on the

government's ability to charge petitioner, and to obtain a conviction, under Section 2119.[13]

The intent requirement that Congress added in 1994 continued, in a different form, a previous statutory limit on federal criminal prosecutions. The amendment replaced the statute's original "possessing a firearm" requirement with another, more functional limitation, designed to focus on the class of carjackings most likely to produce serious bodily harm. After 1994, the applicability of federal law to a carjacking depends on the offender's intention to inflict harm if necessary, rather than on the fortuity of what sort of weapon he might use to inflict it. Requiring the government to plead and prove that a carjacker was fully prepared to cause death or serious bodily harm, if necessary, still functions to limit federal prosecutions to those offenses that present the most serious risk of bodily harm.

In sum, a careful textual analysis of Section 2119 reenforces the conclusion that flows from traditional criminal law principles: A refusal to recognize conditional intent as sufficient for liability would give rise to statutory anomalies, and would restrict the overall scope of the federal carjacking prohibition in a way that Congress could not plausibly have contemplated. The statute can, on the other hand, be read as a coherent and sensible whole, without doing any violence to its text, simply by interpreting its intent requirement in accordance with the long common-law

[13] It is certainly not true that, under a conditional intent construction, carjackings will escape federal prosecution only if the "carjacker [can] show" the absence of an intent to harm (Pet. Br. 27). The affirmative burden of proving the existence of the requisite intent, beyond a reasonable doubt, always rests squarely on the government.

tradition of recognizing a present, but conditional, intent as sufficient to establish criminal liability in similar contexts. Under those circumstances, basic principles of construction require adoption of the more sensible reading of the statute.

C. Nothing In The Drafting History Of The 1994 Amendments Suggests That Section 2119 Should Be Construed To Impose An Unconditional Intent Requirement

As petitioner observes (Br. 21-22), the court of appeals concluded, from its review of the history of the 1994 amendments, that Congress's adoption of the new "intent" requirement with respect to all carjacking offenses "was, in all likelihood, an unintended drafting error" (J.A. 57). See J.A. 54-58 (discussing legislative history); J.A. 68-69, 72-73 (Miner, J., dissenting). In particular, the court acknowledged the district court's "speculat[ion]" that "Congress probably intended the heightened intent requirement to apply only to cases where the carjacking resulted in death, that is, those cases falling under § 2119(3)." J.A. 58; see J.A. 36-41 (district court opinion). The court also cited (J.A. 58) the Third Circuit's discussion in *United States* v. *Anderson*, 108 F.3d at 481-483, which endorsed the analysis of the district court in this case, and further remarked that the "intent" requirement was "[p]resumably" added "in an effort to avoid subjecting the [new] death penalty provision [enacted in 1994] to Eighth Amendment attack for authorizing the death penalty for an accomplice who neither killed nor intended to harm a victim" (*id.* at 482).[14]

[14] The courts' treatment of this issue is based not only on legislative history, but on the actual text of the amending Act. Section 60003(a)(14) of the Federal Death Penalty Act of 1994,

Petitioner argues (Br. 22) that the court of appeals relied on these "speculations" concerning the legislative history of the 1994 amendments as a justification for "redrafting [Section 2119] to include conditional intent." See also J.A. 72 (Miner, J., dissenting). That is incorrect. To the contrary, the court specifically "decline[d] any invitation to redraft the statute." J.A. 58. The court accepted the "specific intent to kill" requirement added in 1994 as applicable to all carjacking cases, including this one, and properly confined its inquiry to determining whether that requirement should, as a matter of ordinary statutory construction, be interpreted to encompass "conditional" intent. J.A. 58-59.

In any event, there is no sufficient reason to conclude that Congress's placement of the new intent requirement in Section 2119's initial paragraph was an "unintended drafting error" (J.A. 57). The

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Pub. L. No. 103-322, Tit. VI, 108 Stat. 1970, directs that "Section 2119(3)" be amended "by striking the period after 'both' and inserting, 'or sentenced to death.'; and by striking, 'possessing a firearm as defined in section 921 of this title,' and inserting', with the intent to cause death or serious bodily harm'." See Pet. Br. 2 (reprinting original and amending provisions). If the initial reference to Section 2119(3) is read to qualify all that follows, then it is not possible for a codifier to comply literally with the amending language, because the "possessing a firearm" language appears, not in clause (3) of Section 2119, but in the introductory language of that Section. The directive to replace one phrase with another is nonetheless clear, and the courts that have interpreted the amended intent requirement have treated the text that appears in the 1994 United States Code as correctly reflecting the amendment as enacted. See, *e.g.*, J.A. 55-56. Neither petitioner nor the United States has ever contended otherwise. Cf. *United States Nat'l Bank of Oregon* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 448-463 (1993).

amending Act, by its terms, substituted that requirement for the "possessing a firearm" element of the original statute. See note 14, *supra*. As we have discussed, that substitution is readily explained by a desire to continue limiting the scope of the federal prohibition to those offenses that pose a serious risk of bodily harm or death, while eliminating unjustified differentiation among particular *means* (gun, knife, club, rope, fist) that an offender might use to cause or threaten serious injury. Because the new intent element applies to all cases under the statute, a construction requiring unconditional intent would leave the statute with a substantially narrower scope than Congress could reasonably have intended. That, however, is an argument for adopting the correct interpretation of the words Congress used in the statute, not a reason for questioning where it placed them.

Similarly, there is little force to the argument that Congress's adoption of the intent requirement must have been linked to concerns about the constitutionality of the potential death penalty that was also authorized by the 1994 amendment to Section 2119. See *Anderson*, 108 F.3d at 482; see also Pet. Br. 22. First, the death penalty added to Section 2119 was only one of many that Congress added or amended in Sections 60003 through 60024 of the Federal Death Penalty Act of 1994, Pub. L. No. 103-322, Tit. VI, 108 Stat. 1968-1982. Section 2119 was amended by subsection (a)(14) of Section 60003 of the Act, which is entitled "Specific offenses for which death penalty is authorized." Congress addressed constitutional concerns about the proper implementation of the death penalty, not in its penalty-authorization amendments to individual substantive provisions like Section 2119, but in a separate section of the Act. Section 60002,

entitled "Constitutional procedures for the imposition of the sentence of death," created an entirely new capital-sentencing chapter of the United States Code, 28 U.S.C. 3591 *et seq.* Pub. L. No. 103-322, Tit. VI, § 60002, 108 Stat. 1959. There is no reason to think that Congress's addition of the intent requirement to Section 2119 was an effort to deal separately (and partially) in that Section with issues it was addressing comprehensively elsewhere in the same legislation. See, *e.g.*, 18 U.S.C. 3591(a)(2) (requiring a finding beyond a reasonable doubt, at the outset of the capital penalty phase, that the defendant's own acts and intentions were sufficiently culpable to satisfy threshold constitutional requirements).

Second, when Congress did act to ensure the constitutionality of its death penalty provisions, it clearly understood this Court's teaching that constitutional proportionality principles require only a mental state of criminal recklessness (combined with major participation in an offense that results in death). See *Tison* v. *Arizona*, 481 U.S. 137, 157-158 (1987); 18 U.S.C. 3591(a)(2)(D) (requiring a finding that the defendant at least "intentionally and specifically engaged in an act of violence * * * [demonstrating] a reckless disregard for human life and the victim died as a direct result of the act"). It is therefore unlikely that Congress was motivated primarily by constitutional concerns when it chose the more demanding intent standard in amending Section 2119.[15]

[15] Certainly there is no reason to suppose that Congress sought to ensure the enforceability of its death penalty provision by requiring, instead of criminal recklessness, an intent to harm that is not only actual, but unconditional.

For these reasons, the argument that Congress acted inadvertently in structuring the 1994 amendments is unpersuasive. Moreover, we agree with the court of appeals' narrower, and more relevant, observation (J.A. 57) that "[t]here is no indication in the Congressional Record as to the purpose of the late-added heightened intent requirement." Under the circumstances, the legislative history is useful only for the general (and, in any event, self-evident) proposition that Congress was deeply concerned, both in 1992 and in 1994, with providing a federal criminal remedy for what it perceived as a very serious national problem. Beyond that, we agree with petitioner (Br. 19) that there is little reason in this case to "resort to legislative history to cloud a statutory text that is clear." *Ratzlaf* v. *United States*, 510 U.S. 135, 147-148 (1994).

D. The Rule Of Lenity Does Not Require A Different Result In This Case

Because construing the intent requirement of Section 2119 to include conditional intent to harm or kill comports with the traditional understanding of intent in the criminal law, and with the language and structure of the statute, petitioner is ultimately reduced to reliance on the rule of lenity. Pet. Br. 31-32. That principle, which rests on concerns about providing fair notice of what conduct is prohibited, and about ensuring that society has actually made a legislative decision to punish the conduct of which an individual stands accused, has its primary application in cases in which there is some doubt whether the legislature intended to criminalize conduct that might otherwise appear to be innocent. See, *e.g.*, *Ratzlaf*, 510 U.S. at 148-149. The offense conduct at issue in this case lies far from that central core of the

lenity doctrine: Even if petitioner's "intent to cause death or serious bodily harm" to his carjacking victims was "conditional," he can claim no legitimate uncertainty about the criminality or blameworthiness of his acts.

In any event, as the Court has recently explained, the rule of lenity is not properly invoked simply because a statute requires some degree of construction to confirm its meaning. *Muscarello* v. *United States*, 118 S. Ct. 1911, 1919 (1998); see also *Caron* v. *United States*, 118 S. Ct. 2007, 2012 (1998) ("The rule of lenity is not invoked by a grammatical possibility."); *Moskal* v. *United States*, 498 U.S. 103, 107-108 (1990). To the contrary, the Court "ha[s] always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute." *United States* v. *R.L.C.*, 503 U.S. 291, 305-306 (1992) (quoting *Moskal*, 498 U.S. at 108); see also *id.* at 311-312 (Thomas, J., concurring) (lenity is not appropriate until after the application of "innumerable rules of construction powerful enough to make clear an otherwise ambiguous penal statute"). As a tie-breaking rule, the lenity principle applies only if there is such "grievous ambiguity or uncertainty" in a statute that, "after seizing everything from which aid can be derived, [the Court] can make no more than a guess as to what Congress intended." *Muscarello*, 118 S. Ct. at 1919 (internal quotation marks and ellipsis omitted). In this case, consideration of Section 2119 in the light of common law and common sense leaves no substantial doubt about the correct interpretation of its intent requirement. The rule of lenity therefore has no application here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1997

FRANCOIS HOLLOWAY, also known as ABDU ALI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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ARGUMENT

The respondent, apparently unhappy that Congress amended the federal carjacking statute in 1994 to add the element of specific intent, asks the Court to use "common law and common sense," to undo Congress' amendment and rewrite the federal carjacking statute. The respondent's plea to ignore the plain meaning of the statute's specific intent requirement, however, must be directed to Congress, because it is not this Court's function to rewrite statutes to suit the respondent's preferences.

I. The Language Of Section 2219 Requires Reversal Of Petitioner's Conviction

The 1994 amendments to the carjacking statute added an unambiguous requirement of proof of specific intent to cause death or serious bodily harm. Congress unconditionally stated the *mens rea* required for criminal culpability and nowhere included, nor even discussed, the concept of conditional intent now advocated by the respondent. Because fundamental principles of statutory construction require that an unambiguously worded statute be applied in accordance with its terms, judicial authority simply does not exist to deviate from the plain language of the statute by adding in the concept of conditional intent. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992). The respondent's brief ignores the first canon of statutory construction that "a legislature says in a statute what it means and means in a statute what it says there." *Id.* When, as here, the words of a statute are unambiguous, this first canon of statutory construction is also the last. *Rubin v. United States*, 449

U.S. 424, 430 (1981). The holdings of the Court simply leave no room for the respondent's attempt to ignore the plain language of the carjacking statute by interjecting a more expansive and completely unstated conditional intent concept into the statute. "[B]ecause, under the government's broader reading the statute would mark a major inroad into a domain traditionally left to the states (the Court should) refuse to adopt the broad reading in the absence of a clearer direction from Congress." *United States v. Bass*, 404 U.S. 336, 339 (1971).

The carjacking statute unquestionably involves the intrusion of the federal government into an area which has traditionally been covered by the states, therefore, the need to adhere to the plain language of the statute is even more compelling. Petitioner's Br. at 23. The absence of a "clear statement" of conditional intent in the amended carjacking statute forecloses any further argument that the concept should be added to the law. *Bass*, 404 U.S. at 347.

Nevertheless, the respondent claims that the Court should interpret the statute to include when the defendant intended "to cause death or serious bodily harm, *if necessary*." Respondent's Br. at 20 (emphasis in original). But the respondent never addresses the most obvious and troubling question: If Congress intended such an interpretation, why did Congress leave the words "if necessary" out of the statute? In drafting and enacting the 1994 amendments to the carjacking statute, Congress specifically decided to add a heightened intent requirement. Certainly, Congress had the ability to expressly include conditional intent within the statute if that was its intention. Because Congress "neither stated nor implied" the

concept of conditional intent "when it made the conduct criminal," *United States v. Bailey*, 444 U.S. 394, 407 (1980), petitioner's conviction should be reversed.

II. A Common Law Tradition of Conditional Intent is a Fiction

Absolutely essential to the respondent is its repeated claim that its conditional intent concept is firmly rooted in the common law. Indeed, the respondent explicitly asks the Court to use "common law and common sense" to find a conditional intent element in the statute. Respondent's Br. at 32. The respondent's argument, however, ignores the critical fact that there is "no federal common law of crimes," *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 181 (1994); *Parratt v. Taylor*, 451 U.S. 527, 531 (1981), and that the elements of a federal crime are solely creatures of statute. *Liparota v. United States*, 471 U.S. 419, 424 (1985); *United States v. Hudson*, 7 Cranch 32, 33-34 (1812).

The lack of federal criminal common law demonstrates that Congress could not have intended to incorporate a completely unstated common law concept of conditional intent into the statute. Nevertheless, the respondent cites state court cases claiming they represent conclusive proof of the acceptance of the concept of conditional intent. The respondent, in a footnote, also refers to a handful of federal cases which supposedly supports its theory. These cases, however, do not help the respondent because they provide no support for its theory that the Court should accept conditional intent as a proxy for specific intent.

The respondent's reliance on state court precedents as support for a common law tradition of conditional intent principally consists of an early twentieth century decision, *People v. Connors*, 97 N.E. 643, 644-645 (Ill. 1912), and the holding of an Indiana court. *Eby v. State*, 290 N.E.2d 89 (Ind. App. 1972). These two cases, together with other cases the respondent briefly mentions in a footnote, Respondent's Br. at 13, n.4, hardly provide a compelling foundation for a common law tradition of conditional intent. Indeed, the cases conflict with the holdings of several other appellate state courts and the *Eby* case even conflicts with a subsequent Indiana case which explicitly states that the *Eby* court "erred in equating conditional intent with specific intent."[1] *Carter v. State*, 408 N.E.2d 790, 796 n.6 (Ind. App. 1980).

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[1] The cases that the respondent discusses in its footnote provide weak support for the respondent's argument. Some of the cases have nothing to do with conditional intent, *see, e.g., State v. Klein*, 547 P.2d 75, 78 (Mont. 1976) (upholding robbery conviction where defendant pointed a gun at the victim such that he purposely or knowingly put his victim in fear of bodily injury), while others have been overruled or disagreed with by other courts in that very jurisdiction. *See, e.g., Warrick v. United States*, 528 A.2d 438, 442 (D.C. 1987) (Entering a home while carrying a dangerous weapon, "might support an inference that he intended to use the weapon *if* somebody attempted to interfere with his taking of property. *A conviction for burglary may not rest on such an 'if.'* ") (emphasis added); *State v. Irwin*, 285 S.E.2d 345, 349 (N.C. App. 1982) (reversing a conviction for assault with intent to kill because "conditional intent to kill will never be actualized if the condition precedent upon which it is based never occurs"). Moreover, apart from the fact that there is "no federal common law of crimes," the fact that a handful of states may recognize conditional intent, while other states do not, can not be said to make conditional intent part "of our traditional legal concepts," nor does it make conditional intent part of our "widely accepted definitions." *United States v. Gypsum*, 438 U.S. 422, 437 (1978) (citation omitted).

Although these cases are hardly sufficient to establish a common law tradition of conditional intent, they are in fact contradicted by the holdings of other state courts, demonstrating that conditional intent is *not* firmly embedded in common law. For example, the Mississippi Supreme Court correctly held that when "the intent to kill was conditioned upon the happening of some other event, which may, within reason, fail to take place, the real intent to kill and murder does not come into existence." *Craddock v. State*, 37 So. 2d 778, 778 (Miss. 1948) (quoting *Stroud v. State*, 131 Miss. 875, 95 So. 738 (1923)). Similarly, an Ohio court held that "assault with intent to kill" is not established by a conditional threat. *State v. Kinnemore*, 295 N.E.2d 680, 682-683 (Ohio App. 1972); *see also State v. Irwin*, 285 S.E.2d 345, 349 (N.C. App. 1982) (intent to kill cannot be established by a "conditional intent to kill").

Thus, even if state common law was a valid basis for upholding a federal criminal conviction, which it is not, the respondent's contention that state courts have consistently created and adhered to a common law concept of conditional intent is unsupported – and indeed contradicted – by precedent.

The respondent next asserts that federal courts have also applied the concept of conditional intent. But the respondent fails to provide any cases from this Court upholding the concept of conditional intent, because

there are none.[2] Therefore, the respondent is unable to supply any meaningful precedent to support its contention, and is reduced to citing in a footnote, a handful of lower court cases which are irrelevant to the application of conditional intent to a completed crime. *See* Respondent's Br. at 14. Indeed, there are no cases where the federal courts have ever recognized conditional intent as satisfying a required specific intent element for a completed substantive crime.

Many of the cases the respondent cites only involve general intent crimes. *E.g., United States v. Richardson*, 27 F. Cas. 798, 798 (C.C.D.C. 1837) (convicted under general intent standard). Others cases contain clear errors of law. *Schaefer v. United States*, 308 F.2d 654, 655 (5th Cir. 1962) (erroneously holding that intent is not based on the "motive of the actor . . . [but] is to be judged objectively . . . [based on] what one in the position of the victim might reasonably conclude."). Still others address conspiracies. But the conspiracy cases stand for the unremarkable conclusion that conspirators are liable for all foreseeable acts in furtherance of the conspiracy. *See United States v. Anello*, 765 F.2d 253, 262 (1st Cir. 1985) ("agreement to buy that is conditional is nonetheless for *conspiracy purposes* an agreement to buy") (emphasis

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[2] The fact that this Court has never recognized conditional intent further weakens the respondent's argument that the concept of conditional intent is part of "the background of our traditional legal concepts." *See* Respondent's Br. at 19 (internal quotations omitted).

added). Once a defendant agrees to be part of a conspiracy, the fact that some actions might be based on future conditions occurring would not excuse the defendant of his crime of joining the conspiracy because "for purposes of criminal conspiracy, virtually all agreements are to some extent, conditional." *United States v. Dworken*, 855 F.2d 12, 19 (1st. Cir. 1988) (citing *Anello*, 765 F.2d at 263).

The respondent next argues that petitioner's offense should be viewed as analogous to cases where circumstances make it impossible for a defendant to commit an intended crime, but where a conviction for an attempt was nevertheless sustained. Respondent's Br. at 19 n.8 (citing *no* cases for this contention). The respondent's argument is sophistry. Although it can be argued that all unconsummated crimes contain a conditional intent element ("I will shoot you unless I die in the next second"), *see Dworken*, 855 F.2d at 18 ("[i]n all unconsummated crimes, the intent to complete the crime is contingent"), intent is based on the actor's belief that he can and will commit the act. *See infra* at 9-12. Moreover, in petitioner's case there is no issue of impossibility, nor was the crime not completed. Consequently, cases dealing with attempts and impossibility are irrelevant to whether conditional intent to do harm satisfies the specific intent requirement in a completed carjacking.

In sum, there is no federal precedent which supports the proposition that a criminal statute which defines specific intent as an element of a *consummated offense* could be satisfied by a state of mind which failed to emerge during the unfolding of events. In an unconsummated crime there may be a basis for criminalizing presently held intentions to do future harm. After the crime is

completed, however, there is no basis for criminalizing alternative intentions and events which did not unfold. Otherwise, juries would be required to speculate as to whether defendants harbored alternative thoughts and conduct in addition to the conduct they chose to commit.

As petitioner demonstrated in his merits brief, in a case where Congress has explicitly spelled out the mental state required for the commission of a crime, the words of the statute must be taken as the final expression of its purpose. *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940); *Liparota v. United States*, 471 U.S. at 424. Nevertheless, even if an additional inquiry is undertaken, neither federal nor state law provides a persuasive reason for finding that a specific intent to cause serious bodily harm or death can be satisfied by proof of conditional intent. Hence, the respondent's desperate attempt to divert the Court's attention to a consideration of common law ultimately fails to provide any justification for expanding the heightened *mens rea* requirement Congress added to the carjacking statute.

III. The Government's Reliance On The Model Penal Code Is Misplaced

Notwithstanding that Congress has never adopted the Model Penal Code,[3] the respondent turns to the Code as support for acceptance of conditional intent as an element of the crime of carjacking. In discussing the

[3] Moreover, federal courts can not adopt the model penal code because federal crimes are exclusively created by statute. *Liparota v. United States*, 471 U.S. at 424.

Code's formulation of conditional intent, however, the respondent ignores the Code's analysis of an essential component of the concept. The respondent completely ignores the fact that under the Code, conditional intent only satisfies a specific intent element if the actor "is aware or believes or hopes" that the condition on which his conditional intent is based, will occur. Model Penal Code § 2.02(2)(a)(ii). Of course, the respondent must ignore this fact because the district court also failed to recognize this essential component of conditional intent and improperly instructed the jury. Consequently, if the respondent were to concede this point, its case would be lost.

Although the Model Penal Code endorses the concept of conditional intent, the drafters of the Code were very careful to limit its application. The Code allows for conditional intent by stating: "When a particular purpose is an element of an offense, the element is established although such *purpose is conditional. . . .* " Model Penal Code § 2.02(6) (emphasis added). But after including this apparently expansive definition of conditional intent, the drafters greatly limited the reach of conditional intent by stating:

> *A person acts purposely* with respect to a material element of an offense when:
>
> i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; *and*
>
> ii) if the element involves the *attendant circumstances*, he is *aware* of the existence of such circumstances or he *believes or hopes* that they exist.

Model Penal Code § 2.02(2)(a) (emphasis added).

Although the respondent claims that Section 2.02(2)(a)(i) completely defines purpose for conditional intent, Respondent's Br. at 18 n.7, it is wrong. Because conditional intent involves a state of mind which will only exist under certain *attendant circumstances*, Section 2.02(2)(a)(ii) is unquestionably applicable and must be satisfied. In a carjacking, a conditional intent to cause serious bodily harm will only arise if the attendant circumstance that the victim offers resistance occurs. Therefore, to sustain petitioner's conviction, the respondent was required to prove that he was aware that the victim is going to resist, or he believed or hoped that the victim would offer resistance. Because awareness, *i.e.*, knowledge, of a future attendant circumstance could never be guaranteed, the Code allows for the awareness requirement for conditional intent to be satisfied by "a high probability of its [the attendant circumstances] existence." Section 2.02(7). As the respondent never proved the petitioner was *aware* of a high probability that the victims would resist, or that he *hoped or believed* that the victims would resist, his conviction should be overturned.

The respondent's claim that it need only satisfy Section 2.02(2)(a)(i) of the Model Penal Code results in an absurd application of the concept of conditional intent and ignores the careful limitations which the Code has clearly provided. To best understand why the respondent's partial application is incorrect consider the following hypothetical. A wrongdoer holds a person at gunpoint and tells the victim: "If a meteor lands at my

feet in the next three seconds, I will shoot you, otherwise I will let you live." Using the respondent's interpretation of the Code, which completely ignores the attendant circumstance of a meteor landing, the wrongdoer is guilty of attempted murder, or at least assault with intent to kill. Using the correct interpretation of the Code, however, the wrongdoer would only be guilty of these crimes if he either: 1) is *aware* of a high probability that a meteor will land at his feet in the next three seconds; 2) he *believes* a meteor will land at his feet in the next three seconds (ignoring a possible insanity defense); or 3) he *hopes* a meteor will land at his feet in the next three seconds. *See* Paul A Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 Stan. L. Rev. 681, 741 n.267 (1983) (discussing Model Penal Code's definition of purpose requiring "awareness of the existence of or a belief that the [attendant] circumstance exists"). Therefore, while the Model Penal Code allows conviction for both a reasonable belief and an unreasonable hope, it still requires proof that the defendant possesses a state of mind consistent with an intention to cause the harm that the statute prohibits.

This correct interpretation of the Model Penal Code's approach to conditional intent has been adopted by at least one federal circuit that has adopted conditional intent for unconsummated crimes and conspiracies. The First Circuit has held that "[i]n keeping with the principles of the Model Penal Code, . . . liability should [only] attach if the defendant reasonably believed that the conditions would obtain." *United States v. Dworken*, 855 F.2d 12, 19 (1st Cir. 1988), *accord United States v. Anello*, 765

F.2d 253, 262-63 (1st Cir. 1985).[4] Here, even if the Court finds that the statute encompasses conditional intent, it should still reverse petitioner's conviction because the respondent failed to prove either that he was aware that a victim would resist or that he believed or hoped that a victim would resist.

Not only did the respondent fail to prove petitioner's knowledge, belief or hope regarding whether a victim would resist, but the district court completely failed to instruct the jury on this issue. *See* Petitioner's Br. at 8-9 (quoting the court's jury instruction). Consequently, the jury was able to convict petitioner without even considering whether petitioner was aware or believed or hoped that a victim would resist the carjacking such that it would be necessary to inflict death or serious bodily harm. Thus, even if the Court permitted the concept of conditional intent to be added to the carjacking statute, the district court's complete failure to charge the jury on the issue of petitioner's belief as to whether a victim would resist to the point that it would be necessary to inflict death or serious bodily harm compels the reversal of his conviction.

IV. Neither The Statute's Use Of The Word "Intimidation" Nor Its Sentencing Provisions Support The Government's Attempt To Read Conditional Intent Into The Statute

The respondent also argues that because the carjacking statute criminalizes the taking of a vehicle by "force

[4] Both of these cases were cited approvingly in the respondent's brief. Respondent's Br. at 14-15 n.5.

and violence or intimidation," the heightened intent requirement must encompass conditional intent. According to the respondent, unless conditional intent is read into the statute, "the number of cases in which the crime was committed only 'by intimidation' . . . would be implausibly small," which it claims, without support, that Congress could not have intended. Respondent's Br. at 22-23.[5] The respondent's argument, however, is undermined by both the plain meaning of the statute along with its legislative history.

At the same time it added a heightened intent requirement to the carjacking statute, Congress simply chose to retain the statute's existing language regarding intimidation. Nothing in the legislative history of the amendments supports the conclusion that Congress desired the revised law to have the same scope as the original statute with regard to acts of intimidation. Moreover, petitioner has shown that in enacting the 1994 amendments to the carjacking statute, several legislators were concerned that, by eliminating the possession of a firearm element, federal jurisdiction would be overly expanded to include traditional state law crimes. Petitioner's Br. at 23. Consequently, Congress decided to both *expand* the reach of the statute by removing the firearm requirement and also *reduce* the reach of the statute by

[5] It should be noted that the original statute's requirement that the perpetrator possess a firearm also limited the use of the intimidation clause. It is likely that there would be a small number of cases where a gun was used, but the government could not prove force and violence. Consequently, under the original statute, intimidation also applied to a relatively small number of cases.

requiring the respondent to prove that the offender had the "intent to cause death or serious bodily harm." Thus, it is by no means surprising that following the passage of the 1994 amendments, it would perhaps be more difficult to prove a carjacking effectuated by means of intimidation.

Although the 1994 amendment requiring a specific intent to kill or cause serious bodily harm reduces the number of carjacking prosecutions involving intimidation (as well as carjackings obtained by force and violence), "intimidation" is still a vital part of the statute and can, in no way, be considered surplusage.[6] The amended carjacking statute passed by Congress simply does not have the reach which the respondent desires.

Indeed, the respondent concedes that requiring an unconditional intent to cause death or serious bodily harm, does not make the word "intimidation" surplusage. Rather it only argues that intimidation would apply to an "implausibly small" number of cases. The fact that the intimidation clause might apply to more cases under the

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[6] In his opening brief, petitioner gave two examples of cases where a car could be taken by intimidation even though the offender had a specific intent to cause serious bodily harm. Petitioner's Br. at 25-26. The respondent responds by arguing that it would find in both cases the car was taken by force and violence. Respondent's Br. at 22 n.11. But the respondent ignores the fact that a reasonable jury might find that without injury there has not been violence, and a reasonable jury might also find that an offender who injures a victim *after* taking possession of the car has not "take[n]" the car by force and violence. In both cases the reasonable jury should still convict because the car was taken by "intimidation."

old statute, which did not have an intent requirement, conditional or otherwise, is not justification for the respondent's attempt to override the plain text that Congress enacted. Congress made a reasoned decision to change the scope of the carjacking statute which included reducing the number of cases whereby a car was taken by intimidation. By claiming that conditional intent must be read into the statute to ensure that the reach of the statute to acts of intimidation remains unchanged, the respondent simply seeks to ignore the statute's plain text. *See Bass*, 406 U.S. at 344 ("While courts should interpret a statute with an eye to the surrounding statutory landscape and an ear for harmonizing potentially discordant provisions, these building principles are not substitutes for congressional lawmaking.").

The respondent also advances the dubious argument that the penalty provision of Section 2119, which authorizes a penalty of up to 15 years for any carjacking regardless of whether there was serious bodily harm, reinforces the conclusion that the statute contemplates conditional intent. The respondent reasons that "it is difficult to imagine many cases in which the respondent will be able to prove an unconditional intent to cause serious harm, but in which such harm will not in fact have resulted." Respondent's Br. at 24. Under the respondent's theory then, it is illogical to have a different penalty for murder than attempted murder, because there would be an "implausibly small" number of cases in which the murderer does not achieve his goals.

The respondent's theory, even if it could contradict the statute's plain meaning, is nonsensical. A defendant's

intent to cause serious bodily harm or death will inevitably have varying possible consequences. A defendant may fully intend to use a knife or gun when he confronts a driver whose immediate flight enables the latter to escape injury. In addition, a carjacker may strike or fire a shot at a victim with the requisite intent and yet a serious injury may not result. Obviously in these cases, the carjacker would be punished under the first penalty clause in Section 2119, which provides for up to 15 years of imprisonment. In a case where such an intent actually causes serious injury or death, the defendant would be subject to the enhanced penalty provisions provided by the second and third penalty clauses.

The contention that in virtually every instance where a defendant possesses an intent to cause serious bodily harm or death, such an injury will inevitably result, is illogical. Consequently, this contention fails to provide any support for reading conditional intent into the carjacking statute.

V. The Rule Of Lenity Requires The Reversal Of Petitioner's Conviction

Finally, despite the respondent's claims to the contrary, lenity requires an interpretation of the carjacking statute in petitioner's favor. The respondent concedes that the rule of lenity applies when "a reasonable doubt persists about a statute's intended scope even *after* resort to the language and structure, legislative history, and motivating policies' of the statute." Respondent's Br. at 32 (emphasis in original) (quoting *United States v. R.L.C.*, 503 U.S. 291 305-06 (1992) (internal quotations omitted)). This

three-part test established by the Court demonstrates that the rule of lenity applies in this case. First, the respondent has, at best only demonstrated ambiguity regarding the text and structure of the statute. Indeed, if the text clearly supported the respondent's position, the respondent would not be reduced to asking the Court to use *"common law and common sense"* to interpret the statute. Respondent's Br. at 32 (emphasis added). Second, the respondent concedes that the "legislative history" is not "useful" for interpreting the statute. Respondent's Br. at 31. Finally, the respondent concedes that the motivating policies are unclear because "there is no indication in the Congressional Record as to the purpose of the late-added heightened intent requirement." *Id.* (quoting the opinion below).

As petitioner has demonstrated, the respondent's attempt to add the concept of conditional intent to the carjacking statute: (1) finds no support in the language of the law; (2) has no sound roots in the common law; (3) unquestionably reduces the *mens rea* legislated by Congress; and (4) expands the reach of the law in a manner which at best raises serious questions concerning whether such an interpretation is consistent with Congressional intent.

Thus, as demonstrated in petitioner's brief, even if this Court were to reject petitioner's showing that the carjacking statute's text and structure requires an unconditional intent, the respondent can, at best, hope for a determination that a "grievous ambiguity" exists in the law. Because nothing in the language of the statute or its legislative history even mentions the concept of conditional intent, reading that concept into the statute would

clearly represent "'no more than a guess as to what Congress intended'," *Muscarello v. United States*, 118 S. Ct. 1911, 1919 (1998) (citations omitted), which is prohibited by the rule of lenity.

CONCLUSION

For the foregoing reasons, and for the reasons stated in petitioner's opening brief, petitioner's conviction should be reversed.

Respectfully submitted,

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(8)

No. 97-7164

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1997

FRANCOIS HOLLOWAY,
also known as ABU ALI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

This brief *amicus curiae* is submitted in support of Petitioner Francois Holloway. By letters filed with the

Clerk of the Court, Petitioner and Respondent have consented to the filing of this brief.[1]

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with a membership of more than 9,000 attorneys and 28,000 affiliate members, including representatives from all fifty states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates.

NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner.

Among NACDL's stated objectives is the

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[1] As required by Rule 37.6 of this Court, *amicus curiae* submits the following: no party or party's counsel authored this brief in whole or in part; no person or entity other than *amicus curiae*, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief.

promotion of the proper administration of criminal justice, which includes the construction of statutes consistent with their unambiguous terms, and therefore in a manner that can be predicted accurately not only by persons subject to enforcement, but also by those who enforce the laws.

As a result, NACDL, consistent with its mission, files this brief *amicus curiae* in support of petitioner's claim that the Court of Appeals erred in permitting petitioner's conviction based on a "conditional intent" that is not anywhere described in the statute under which he was charged.

STATEMENT

Amicus adopts petitioner's statement of the case.

SUMMARY OF ARGUMENT

This case presents an issue of fundamental importance to the administration of the criminal justice system: whether unambiguous language defines the parameters of a federal criminal statute, or whether courts, in the guise of divining legislative "purpose" or "intent," and by resort to legislative history and other extra-statutory sources, are permitted to substitute their version of what they believe should be the ambit of the statute.

Obviously, the latter form of statutory construction portends grave repercussions for not only the doctrine of

separation of powers, but also the protection afforded by the Due Process clause of the Fifth Amendment to the United States Constitution. Judicial expansion of the scope of a statute usurps the function of the legislature and renders criminal laws so flexible as to preclude advance understanding by persons subject to the law, as well as by those charged with enforcement responsibility.

Here, the federal carjacking statute, 18 U.S.C. §2119, contains a specific intent provision requiring that the government establish a defendant's "intent to cause death or serious bodily harm." However, the Court of Appeals below determined that the plain language of the statute would narrow its application too substantially, and, as a result, engrafted on the statute a "conditional intent" element in satisfaction of the specific intent requirement.

In so doing, the Court of Appeals eschewed the rules of statutory construction, and appropriated for the judiciary the exclusive province of the legislature. The Court of Appeals' decision also perpetuated a conflict among the Circuit Courts of Appeal with respect to whether a "conditional intent" to "cause death or serious bodily harm" is sufficient under 18 U.S.C. §2119.

As detailed below, the decisions premising convictions under §2119 on a defendant's "conditional intent" contravene the clear language of the statute, violate the principles of statutory construction developed by this Court, and represent, ultimately, those courts' replacement

of the legislature's enactment with one created by the judiciary on an *ad hoc* basis.

Moreover, in so doing, the courts that have allowed "conditional intent" to suffice have found legislative "intent" where none exists, have misapplied purportedly analogous caselaw, and have incorporated by unsupported inference provisions in §2119 that were *explicit* in the other statutes referred to by comparison.

Thus, not only is the inclusion of "conditional intent" in §2119 an invalid exercise of judicial authority, but the methodology employed to achieve that inappropriate objective is fatally flawed.

Accordingly, *amicus* respectfully submits that the decision of the United States Court of Appeals for the Second Circuit should be reversed, and Petitioner's conviction vacated.

ARGUMENT

I. THE COURT BELOW ERRED IN HOLDING THAT THE DEFENDANT'S "CONDITIONAL INTENT" TO "CAUSE DEATH OR SERIOUS BODILY HARM" SATISFIED THE SPECIFIC INTENT ELEMENT WITHIN 18 U.S.C. §2119

A. The Canons of Statutory Construction

This Court has often repeated that examination of a statute

> begin[s] with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself.

Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

In that context, as this Court has instructed, "absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Id.*

In addition, this Court has explained that when it "find[s] the terms of a statute unambiguous, judicial inquiry is complete, except 'in rare and exceptional circumstances.'" *Rubin v. United States*, 449 U.S. 424, 430

(1981) (citations omitted).

B. The Plain Language of 18 U.S.C. §2119

Here, the amended version of 18 U.S.C. §2119 (that was in effect when the offense charged below was committed) provides that:

> Whoever, *with the intent to cause death or serious bodily harm* takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall –
>
> (1) be fined under this title or imprisoned not more than 15 years, or both,
>
> (2) if serious bodily injury (as defined in section 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242 of this title) results, be fined under this title or

> imprisoned not more than 25 years, or both, and
>
> (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death.

18 U.S.C. § 2119 (1997) (emphasis added).

That languages requires that the defendant possess specific "intent to cause death or serious bodily harm." *United States v. Randolph*, 93 F.3d 656, 661 (9th Cir. 1996). In *Randolph*, *supra*, the Ninth Circuit, relying on that language, held that the specific intent element was *not* satisfied by a defendant's mere "conditional intent," *i.e.*, the intent to cause the requisite harm only if the occupant of the vehicle resists. 93 F.3d at 665. *See also United States v. Craft*, ___ F. Supp. ___ 1996 WL 745527 (E.D. Pa. 1996) (since "[t]he language of the statute is explicit[,]" the "conditional intent" approach advanced by the government was rejected).[2]

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[2] In the Second Circuit below in this case, Judge Miner dissented, and opted to follow *Randolph*, because he "perceive[d] no basis in the plain language of the statute or in the legislative history for an element of conditional intent in the crime under examination here." *United States v. Arnold (Holloway)*, 126 F.3d 82, 90 (2d Cir. 1997) (Miner, J., *dissenting*).

C. The Conflict In the Circuits Over Whether "Conditional Intent" Is Sufficient Under §2119

Nevertheless, while not disputing that §2119 is a specific intent crime, three other Circuit Courts of Appeals, including the Second Circuit below in this case, have found that a defendant's "conditional intent" can suffice. *See United States v. Arnold (Holloway)*, 126 F.3d 82, 85-89 (2d Cir. 1997); *United States v. Romero*, 122 F.3d 1334, 1338-39 (10th Cir. 1997); *United States v. Anderson*, 108 F.3d 478, 481-85 (3d Cir. 1997).

In so doing, those courts eagerly looked beyond the language of the statute, the plain terms of the provision notwithstanding. For example, in *Anderson*, without first finding any ambiguity in the statutory language itself, the Third Circuit contended that "[a] review of the legislative history and development of the carjacking statute is critical in determining which court's interpretation of the intent provision of the carjacking statute this Court should adopt." 108 F.3d at 481.[3]

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[3] The divergent courts to which the Third Circuit was referring in *Anderson* were the Ninth Circuit in *Randolph*, *supra*, versus the District Court below in this case, and the District Court in *United States v. Norwood*, 948 F. Supp. 374 (D.N.J. 1996) (which had adopted the rationale of the District Court in this case). However, the result may have been a foregone conclusion since the District Court in *Norwood*, sitting by designation, authored

Similarly, in *Arnold (Holloway)*, the Second Circuit below, again without first locating any ambiguity in the statutory language, embarked on a detailed examination of the history of the 1994 amendments to §2119 in order to ascertain the legislative purpose underlying those changes. 126 F.3d at 85-86.

That effort reduced the courts' analysis to pure guesswork, as demonstrated by the equivocal conclusions they reached. For instance, in *Anderson*, *supra*, in seeking to determine Congressional intent, the Third Circuit couched its discussion with qualifiers such as, "presumably" why Congress added the specific intent provision, and what Congress "apparently intended" by adding the new intent requirement. 108 F.3d at 482.

Likewise, below, the Second Circuit surmised that that the inclusion of the specific intent requirement was "in all likelihood[] an unintended drafting error." 126 F.3d at 86 (citations omitted).[4]

Moreover, the District Court's opinion below

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the Third Circuit's opinion in *Anderson*.

[4] The District Court below also hedged its conclusion: "perhaps" the specific intent requirement was added due to the addition of a death sentence for the offense. *United States v. Holloway*, 921 F. Supp. 155, 158 (E.D.N.Y. 1996).

maintained, based on the legislative history and remarks by individual legislators, that

> carelessness in the legislative process has produced a criminal statute that says something fundamentally different than what Congress obviously meant to say.

United States v. Holloway, 921 F. Supp. 155, 156 (E.D.N.Y. 1996).[5]

The District Court also asserted that in enacting the 1994 amendments Congress "*inadvertently* closed [the door to carjacking prosecutions] substantially by *unintentionally* imposing the specific intent requirement on the entire statute, not just in death penalty cases." 921 F. Supp. at 159 (emphasis added).

In permitting "conditional intent" to satisfy the specific intent element of §2119, these courts were candid in attributing their motivation: they simply preferred *their* interpretation, which they believe reflected Congress's intent, to the plain language of the statute.

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[5] Of course, the District Court did not explain why, if the statute is so dramatically different from what Congress intended, it has not been amended despite three attempts to do so. *See Arnold*, *supra*, 126 F.3d at 91 (Miner, J., *dissenting*).

In *Anderson*, *supra*, the Third Circuit, citing the District Court's opinion below here, remarked that unless "conditional intent" were permitted to satisfy the specific intent requirement, the result would be to

> drastically narrow the application of the carjacking statute, when, in fact, the legislative history reveals that the intent element should not have even been added as an element of the substantive offenses at all.

108 F.3d at 483. *See also United States v. Arnold (Holloway)*, *supra*, 126 F.3d at 88; *United States v. Holloway*, *supra*, 921 F. Supp. at 159.[6]

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[6] In *Anderson*, the Third Circuit rejected the Ninth Circuit's conclusion in *Randolph* not because *Randolph* was in conflict with the statutory language, but because *Randolph* "directly contravene[d] the intent of Congress to broaden the application of the carjacking statute by the inclusion of the 1994 amendments." 108 F.3d at 483.

D. The Creation of "Conditional Intent" In §2119 Violated the Rules of Statutory Construction and Invaded the Exclusive Province of the Legislature

Thus, the Second and Third Circuits, following the decision of the District Court below in this case,[7] dispensed with the unambiguous provisions of the statute in favor of a judicially created "conditional intent" element that purportedly implemented the unstated will of Congress.

Indeed, while the Second Circuit below claimed that it "decline[d] any invitation to redraft the statute[,]" *Arnold (Holloway)*, 126 F.3d at 86, the dissent by Judge Miner correctly replies that "that in fact is what [it] ha[s] done here." 126 F.3d at 92 (Miner, J., *dissenting*).

That judicial expansion of an unambiguous statute, based ostensibly on "legislative purpose," constitutes precisely the type of speculation that this Court has consistently prohibited.

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[7] The Tenth Circuit, in *United States v. Romero*, *supra*, adopted the Third Circuit's conclusions in *Anderson*. 122 F.3d at 1338-39. The Tenth Circuit also stated that "conditional intent" was sufficient because under §2119 the taking of the vehicle could be accomplished by "intimidation." 122 F.3d at 1338-39. However, in *Randolph*, *supra*, the Ninth Circuit pointed out that such a construction "would be to make surplusage of the intent element." 93 F.3d at 665 & n. 6.

As this Court stated in *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 98 (1991), "[t]he best evidence of [legislative] purpose is the statutory text adopted by both Houses of Congress and submitted to the President."

In fact, *Casey* involved a closely analogous situation, in which it was also argued that an omission from a statute (42 U.S.C. §1988) created unintended consequences inconsistent with similar legislation. As this Court noted, "the argument runs, the 94th Congress simply forgot; it is our duty to ask how they would have decided had they actually considered the question." 499 U.S. at 100 (citation omitted).

However, this Court cautioned that "[t]his argument profoundly mistakes [the Court's] role." *Id.* Instead, this Court explained that when statutory language is *not* ambiguous,

> it is not [the Court's] function to eliminate clearly expressed inconsistency of policy and to treat alike subjects that different Congresses have chosen to treat differently. The facile attribution of congressional "forgetfulness" cannot justify such a usurpation.

499 U.S. at 101.

That principle applies with equal force to complaints about a "careless" Congress, since the source of the judicial dissatisfaction is the same: the statute does not state what the court believes it ought (or meant) to state. Indeed, the government's position here corresponds exactly with its position in *Iselin v. United States*, 270 U.S. 245 (1926), in which the statutory language, as here, was "plain and unambiguous," 270 U.S. at 250.

Responding to the government's arguments in *Iselin*, this Court pointed out that

> [w]hat the government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope.

270 U.S. at 251.

Nevertheless, ultimately, as this Court declared, "[t]o supply omissions transcends the judicial function." *Id.* (citations omitted). That is a legislative responsibility exclusively, and to allow the courts to assume that function offends two fundamental constitutional tenets: separation of powers, and Due Process. *See United States v. R.L.C.*, 503 U.S. 291, 309 (1992) (Scalia, J., joined by Kennedy, J. and Thomas, J., *concurring*).

Indeed, it is impossible for those who enforce the law, and those who are subject to its proscriptions, to know what is proscribed if the plain language of a statute can be superseded by a subsequent judicial extrapolation of legislative history and "purpose."[8]

That makes a mockery of the Due Process guarantee of adequate notice, as Justice Scalia's concurring opinion in *R.L.C.* pointed out:

> [i]t may well be true that in most cases the proposition that the words of the United States Code or the Statutes at Large give adequate notice to the citizen is something of a fiction [citation omitted], albeit one required in any system of law; but necessary fiction descends to needless farce when the public is charged even with knowledge of Committee Reports.

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[8] In fact, allowing "conditional intent" does not resolve any ambiguity in §2119, but breeds one where it would not otherwise exist. The notion of "conditional intent" introduces gradations of time and distance, as well as additional subjective criteria, that would render the intent provision far more complicated and indeterminable. *See, e.g. Arnold, supra*, 126 F.3d at 89 n. 4. *Cf. United States v. Arrellano*, 812 F.2d 1209, 1212 (9th Cir. 1987).

503 U.S. at 309.

Judicially crafted legislation also eviscerates the legislature's primacy in the field of enacting criminal laws. As Justice Scalia's concurring opinion in *R.L.C.* notes,

> "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity."

Id. (Scalia, J., joined by Kennedy, J. and Thomas, J., *concurring*) (*quoting United States v. Bass*, 404 U.S. 336, 348 (1971) (other citations omitted).

It also intrudes upon state jurisdiction over criminal prosecutions since, as the dissent below notes, "carjacking is essentially a state offense, and it may well be the intent of Congress to limit the scope of the federal offense." 126 F.3d at 91 (Miner, J., *dissenting*) (citation omitted). Thus, comity considerations are implicated as well. *See, e.g., United States v. Lopez*, 514 U.S. 549 (1995) (holding unconstitutional on commerce clause grounds federal statute prohibiting schoolyard possession of gun).

E. The Reasons Cited By the Courts Below Fail to Justify the "Conditional Intent" Element

Nor are the justifications cited by the Circuit courts sufficient to overcome these essential principles. For example, even though allowing "conditional intent" to satisfy the statute would extend its reach to conduct of similar methodology and seriousness, *see United States v. Holloway*, *supra*, 921 F. Supp. at 159; *United States v. Arnold (Holloway)*, *supra*, 126 F.3d at 86, 88; *United States v. Anderson*, *supra*, 108 F.3d at 484, that is not a valid basis for ignoring §2119's plain language.

Indeed, that principle is almost as old as the republic itself, and dates back to Chief Justice Marshall's opinion in *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820):

> [t]o determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, *so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.*

18 U.S. (5 Wheat.) at 96 (emphasis added).

The statements of individual legislators, even the sponsors of the 1994 amendments to §2119, are also unavailing. As this Court has repeatedly instructed, when a statute

> contains a phrase that is unambiguous – that has a clearly accepted meaning in both legislative and judicial practice – we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process.

Casey, *supra*, 499 U.S. at 98-99. *See also Consumer Product Safety Commission*, *supra*, 447 U.S. at 118 ("ordinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history").

F. Even If Relevant, the Legislative History Does Not Support the "Conditional Intent" Element

Moreover, even if the legislative history were relevant, there is not any basis for concluding that Congress intended the specific intent element to be diluted by permitting "conditional intent" to suffice. As noted in

the dissent below, Congress has had three opportunities to "correct" the "inadvertent" inclusion of the specific intent requirement in the 1994 amendments, and three times Congress has declined to pass amendments designed to achieve that objective. *See United States v. Arnold (Holloway)*, *supra*, 126 F.3d at 91 (Miner, J., *dissenting*).

That Congressional refusal to amend §2119 further is at least as powerful, if not more powerful, a manifestation of Congress's intent as anything cited in support of the concept of "conditional intent."

In addition, the Second Circuit's reference to state statutory schemes that have codified "conditional intent" merely proves the point: *"conditional intent" is expressly permitted by statute* in those jurisdictions. *See Arnold (Holloway)*, *supra*, 126 F.3d at 88 (*citing* criminal codes of Delaware, Pennsylvania, and Hawaii).

As the dissent below noted, there is not any such corresponding provision in the federal criminal code, or any provision of the United States Code that authorizes "conditional intent," and there does not exist any federal common law of crimes. *Arnold (Holloway)*, *supra*, 126 F.3d at 92 (Miner, J., *dissenting*).[9]

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[9] The dissent also noted that while the majority opinion relied in part on the Model Penal Code (as did the District Court as well, 921 F. Supp. at 160), the Code "has never been adopted by Congress." 126 F.3d at 92 (Miner, J., *dissenting*).

G. The Cases Cited In Support of Including "Conditional Intent" In §2119 Are Inapposite

Also, the cases cited by the courts that have adopted "conditional intent" as part of §2119 are inapposite. For instance, *United States v. Marks*, 29 M.J. 1 (C.M.A.1989), involved a *general* intent crime, aggravated arson. Similarly, in *Shaffer v. United States*, 308 F.2d 654 (5th Cir. 1962), the Court's analysis was performed in the context of an *objective* standard, relying in part on the victim's reasonable perceptions, and not with respect to a defendant's *specific* intent.

In *United States v. Dworken*, 855 F.2d 12, 18-19 (1st Cir. 1988), the analysis was in the context of a conspiracy charge, and *unconsummated offenses*. Also, in *Dworken* the First Circuit pointed out that the defendant clearly wanted the condition (a successful negotiation of a marijuana transaction) to obtain, and "had every reason to believe that there was a reasonable likelihood that he would realize his goal." 855 F.2d at 19.

That is completely unrelated to the circumstances present here, as is the burglary analogy set forth in *United States v. Arrellano*, 812 F.2d 1209, 1212 n. 2 (9th Cir. 1987), in which the burglar's intent to rape is frustrated by the fact that the dwelling is empty. In that situation, the burglar possesses an *unconditional* intent to commit the

felony (rape of the occupant); the condition that is unfulfilled is not the offender's *intent*, but rather the presence of the victim. Thus, it is only the completion of the underlying offense, and not the defendant's intent (nor his liability for burglary) that is contingent on any subsequent circumstance or event.

Here, it is the defendant's *intent* itself that is conditional. Such a standard of intent is absent from §2119, and from the United States Code. The language of the statute, therefore, could not be plainer. Consequently, the resort to legislative history was inappropriate, and, even if it was not, the legislative history does not support the conclusion that Congress intended "conditional intent" to suffice.

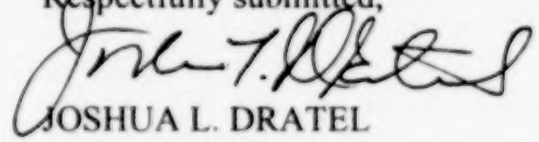
It is respectfully submitted that re-drafting of statutes by the courts seriously threatens the fundamental principles of separation of powers and Due Process. If unambiguous laws are subject to judicial enlargement, there cannot be any certainty as to their meaning, and/or their enforcement. That defeats the very purpose of legislation, and Congress's constitutional mandate. In order to preserve these basic values of the criminal justice and constitutional system, it is respectfully submitted that the Second Circuit's decision below must be reversed.

CONCLUSION

Accordingly, for the reasons set forth above, as well as for those set forth in Petitioner's Brief, it is respectfully submitted that the decision of the United States Court of Appeals for the Second Circuit should be reversed, and petitioner's conviction vacated.

Dated: 2 July 1998
New York, New York

Respectfully submitted,



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